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LEGAL CRITICAL FACTORS ANALYSIS

MIAMI VALLEY REGIONAL PLANNING COMMISSION

PREPARED FOR
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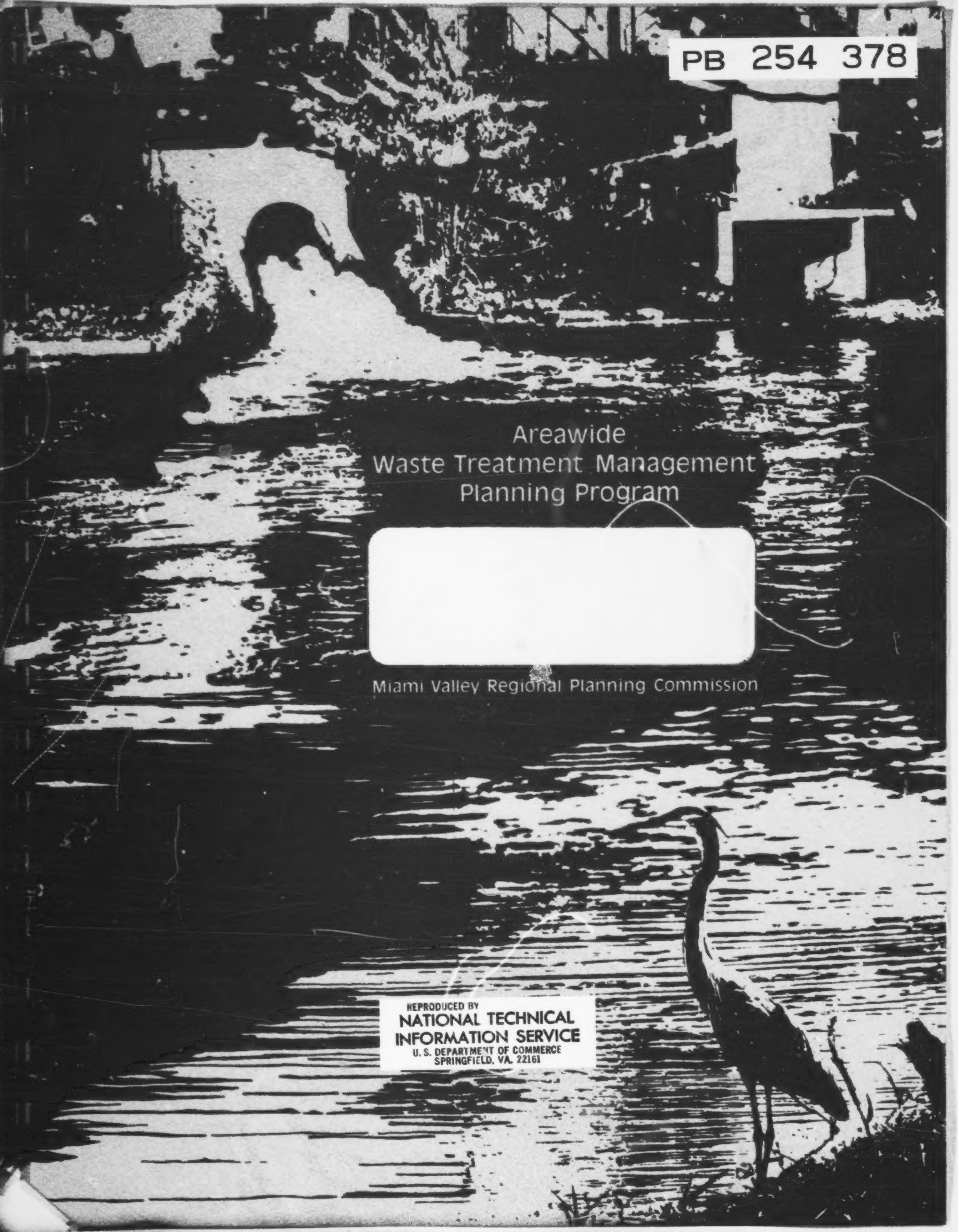

Areawide Waste Treatment Management Planning Program

Miami Valley Regional Planning Commission

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The legal functions, powers, and capacities of eleven different types of governmental units which are now, or might be, engaged in water pollution activities in the Miami Valley (Ohio) area are described in comparing the statutory powers of each unit with twenty-five points derived from management agency descriptions found in Section 208 (PL 92-500), subsequent implementing guidelines, and evaluative literature. The information is used in the development of alternatives for the designation of the management agency(cies) capable of implementing the Section 208 (PL 92-500) areawide waste treatment management plan.

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M 7

March, 1976

Miami Valley Regional Planning
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Approved by the Water Resources Committee
March 16, 1976

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PREFACE

This report, Legal Critical Factors Analysis, is one of a series of eight reports which together provide background information necessary for the development of the management component of the Section 208 Areawide Water Quality Management plan and program being developed by the Miami Valley Regional Planning Commission (MVRPC). Much of the research work on which this report is based was also financed through Grant Number P005151 01 to the Toledo Metropolitan Area Council of Governments.

In June, 1974, the MVRPC received a two-year grant from the United States Environmental Protection Agency (USEPA) for the purpose of preparing an areawide water quality management plan for the five county region - Darke, Greene, Miami, Montgomery and Preble Counties - as specified under Section 208 of the Federal Water Pollution Control Act Amendments of 1972. In February, 1975, the MVRPC retained the services of Linton and Company, Incorporated, to assist in the development of the management component of that plan. Since that time the respective staffs have worked to develop an informational background needed to determine the management alternatives which will fit the technical alternatives selected toward solutions of present and potential water quality problems.

The reader will find that one report may reference one or more reports in this series. Because each report is quite detailed it was felt that referencing another report in the text rather than recapitulating its contents was the wisest course. The other seven reports in this series are:

A Review of Federal Programs Impacting
Regional Water Quality Management

Experience and Potential for Regional
Water Quality Management

Financial Critical Factors
Analysis

A Review of Local Agencies Impacting
Regional Water Quality Management

A Review of Regional Agencies Impacting
Regional Water Quality Management

A Review of State Agencies Impacting
Regional Water Quality Management

A Review of Critical Factors Impacting
Regional Water Quality Management

INTRODUCTION

It is the purpose of this report* to review, in the light of the purposes and provisions of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter FWPCAA or the Act) as explicated in the Guidelines for Areawide Waste Treatment Management Planning (the Guidelines) issued under the FWPCAA by the U.S. Environmental Protection Agency (USEPA),

> (A) the legal functions, powers, and capacities of governmental units and entities which are, or might be, engaged in water pollution activities in the Miami Valley and
>
> (B) existing and possible institutional arrangements among such units and entities,

for the purpose of assisting the Miami Valley Regional Planning Commission (MVRPC) to identify management agencies and institutional arrangements for designation under Section 208 (c) of the FWPCAA.

Background and relevant statutory provisions

On June 27, 1974, MVRPC was designated by the Governor of the State of Ohio, pursuant to Section 208 (a) (2) of the FWPCAA with the approval of the Administrator of the FWPCAA, as the

> "single representative organization, including elected officials from local governments or their designees, capable of developing effective areawide waste treatment management plans"

for the Miami Valley area.

Under Section 208 (b) of the FWPCAA, MVRPC, as such designee, is required to have in operation a continuing areawide waste treatment management planning process and to develop plans for certification by the Governor and submission to the Administrator. The Administrator is required, under Section 208 (f) of the FWPCAA, to make grants to MVRPC as the designated agency under Section 208 (a), for payment of the reasonable costs of developing and operating a

---

* This report is based on legal research by Mark A. Gettelson, Esq., who is not a member of the Ohio bar.

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continuing areawide waste treatment management and planning process. The technical work of the planning task is now in progress pursuant to a contract dated February 10, 1975, between MVRPC and the Miami Conservancy District.

Section 208 (b) (2) of the FWPCAA requires that the plan to be prepared include, in addition to the identification of treatment works necessary to meet anticipated waste treatment needs of the area and proposed financing thereof, the establishment of priorities and time schedules, therefore, the establishment of a regulatory program for implementation of the plan, identification of pollutants, and the like,

> "(D) the identification of those agencies necessary to construct, operate, and maintain all facilities required by the plan and otherwise to carry out the plan."

Section 208 (c) (1) of the FWPCAA further requires that the Governor, in consultation with MVRPC (as the designated planning agency), at the time the plan is submitted to the Administrator, designate one or more "waste treatment management agencies" for the area and submit the same to the Administrator. Such designations must be accepted by the Administrator under Section 208 (c) (2) unless he finds that the agency or agencies designated do not have adequate authority:

> "(A) to carry out appropriate portions of an areawide waste treatment management plan developed under subsection (b) of this section;
>
> "(B) to manage effectively waste treatment works and related facilities serving such area in conformance with any plan required by subsection (b) of this section;
>
> "(C) directly or by contract, to design and construct new works, and to operate and maintain new and existing works as required by any plan developed pursuant to subsection (b) of this section;
>
> "(D) to accept and utilize grants, or other funds from any source, for waste treatment management purposes;
>
> "(E) to raise revenues, including the assessment of waste treatment charges;

> "(F) to incur short-and long-term indebtedness;
>
> "(G) to assure in implementation of an areawide waste treatment management plan that each participating community pays its proportionate share of treatment costs;
>
> "(H) to refuse to receive any wastes from any municipality or subdivision thereof, which does not comply with any provisions of an approved plan under this section applicable to such area; and
>
> "(I) to accept for treatment industrial wastes."

Grants under the FWPCAA are limited to such designated agencies for works in conformity with the plan (Section 208 (d)).

The Guidelines

The *Guidelines* were issued by the EPA in August, 1975,

> "to assist 208 planning agencies in carrying out their areawide waste management planning responsibilities within designated areas."

The *Guidelines* (page 1-2) emphasize the importance of developing an "integrated approach" for solving pollution problems and choosing the most effective "management agency and institutional arrangements" to assure implementation of the plan. This is further explained at Section 3.4 of the *Guidelines* (pages 3-16 and 3-17) as follows:

> "The purpose of management planning is to select a management agency or agencies and to develop appropriate institutional arrangements through which the plan can be implemented. Institutional arrangements for areawide waste treatment management are the formal structure of affected state and local units of government for planning and implementing an areawide water quality management plan.

> "The Act clearly specifies the responsibilities and functions of the management agency(s). The criteria that should be used to determine whether the management agency(s) can properly carry out these responsibilities are:
>
> adequate legal authority
>
> adequate financial capacity
>
> "The Act does not, however, stipulate what institutional arrangements should be utilized to enable plan implementation. Criteria for evaluating the adequacy of the management agency(s) and institutional arrangements should be.
>
> Practicability--to what extent do institutional arrangements rely on existing water quality management agencies? Are the institutional arrangements politically feasible?
>
> Managerial capacity--to what extent do institutional arrangements provide for program oversight including procedures for resolving conflicts and cooperating with other areawide planning activities?
>
> Public Accountability--to what extent do institutional arrangements provide for a decision-making process accountable to the area electorate?"

The Guidelines (page 3-18) explicity recognize the need to adopt a "pragmatic strategy" in formulating institutional arrangements, avoiding fragmentations of authority and responsibility.

> "The greater the number of agencies involved in implementing the plan, the greater the need to coordinate between the agencies . . .
>
> "The complexity of institutional arrangements should not prevent a clear delineation of the decision-making process used to implement the plan. In particular, there should be an explicit arrangement for ensuring overall supervision and enforcement of the management plan.

In that connection, the Guidelines make it clear (at page 7-13) that MVRPC, as the local A-95 review authority (under OMB Circular A-95 Revised, dated November 13, 1973), must review all applications for grants under the FWPCAA for consistency with areawide plans and other regional concerns.

In discussing the "management planning process" essential to implementation of a plan approved under the FWPCAA, the Guidelines (at page 3-19) suggest a legal analysis of an area's ability to meet the FWPCAA's requirements, an evaluation of existing financial arrangements bearing on the matter, and an assessment of the potential of existing institutions to perform regional water quality management.

> "This evaluation should seek to assess the effectiveness of regional management to date and the strength of the area's traditions and commitment to regional approaches. The evaluation should incorporate an appraisal of the relationships between federally funded regional planning authorities and regional or local water quality management agencies such as transportation, land disposal of wastes, land use planning, and water supply when such agency activities affect water quality. The purpose of the evaluation is to help ensure that implementation plans are constructed on a realistic foundation which reflects the area's experience in regionalized management."

The Guidelines (at page 7-1) impose on MVRPC, as the designated 208 planning agency, the burden of taking "a lead role in formulating institutional arrangements for the area."

The Management Planning Process

From the foregoing it is clear that the management planning process for the area must be regional in scope, and that, absent a single agency capable of performing the required management agency functions under Section 208 (c) of the FWPCAA, coordinative management of all governmental units and agencies engaged in water control activities in the Miami Valley area will be necessary to assure achievement of the Act's objectives.

The Guidelines (page 7-11) recognize that the FWPCAA's purposes can be achieved where there is a single planning agency and plural "management" agencies, thereby permitting existing entities already providing waste treatment service to continue with a minimum effect on their internal administration. In such cases, there should be

> "a single supervisory agency with clear responsibility and resources for overall management, coordination, and plan enforcement" (page 7-12).

Intergovernmental agreements should be considered as a means for achieving that result.

Management Agency(s) and Institutional Arrangements for the Miami Valley

As anticipated by the Guidelines, there is not, in the five county area represented in the MVRPC, any single operating wastewater control agency of regional scope, whose membership comprises elected officials or their designees, available for designation as a sole "management agency" under Section 208 (c) (2) of the FWPCAA.

There are, however, a number of governmental entities active in the wastewater quality control field in the Miami Valley region, as well as others having the potential of functioning therein, which merit consideration for identification by MVRPC as management agencies.

There is also precedent in the Miami Valley region for institutional arrangements for coordinative management of such agencies.

The governmental entities whose legal functions and powers are reviewed herein are as follows:

(a) Ohio Environmental Protection Agency (OEPA).

(b) Ohio Water Development Authority (OWDA).

(c) Ohio Department of Natural Resources (ODNR).

(d) Conservancy Districts.

(e) Sanitary Districts.*

---

* None presently exist in the five county Miami Valley area.

(f) Water and Sewer Districts (Regional).*

(g) Soil and Water Conservation Districts.

(h) Regional Councils of Government (COG)* and Regional and County Planning Commissions.

(i) County Sewers.

(j) Municipal Corporations.

The foregoing entities will be reviewed from the standpoint both of the powers which management agencies are required to possess under Section 208 (c) (2) (A) - (I) of the FWPCAA and those useful in implementation of the areawide plan, based upon other sections of the FWPCAA as well, e.g., Section 208 (b) (2) and 204 (b) (1) (A) - (B). The importance of many of these functions is discussed in an Indiana University study entitled, Problems and Approaches to Areawide Water Quality Management (hereinafter, Indiana Study) as well as in the Guidelines.

A. The required powers are the following:

1. Authority to construct and operate treatment works required by the areawide plan. (Section 208(c)(2)(C) of the FWPCAA);

2. Authority to receive or accept monies from any source and/or the authority to receive and accept federal grants for the purpose of water pollution control. (Section 208 (c) (2) (D));

3. Authority to raise revenues by assessing all users of the system on the basis of the cost of treatment or the characteristics of the effluent. (Section 208 (c) (2) (E); Section 204 (b) (1) (A));

4. Authority to assess or enter into contracts with private industry for the repayment of their percentage share of construction costs

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* None presently exist in the five county Miami Valley area.

which were funded by federal grants. (Section 208 (c) (2) (E); Section 204 (b) (1) (B));

5. Authority to incur short-and long-term indebtedness (Section 208 (c) (2) (F));

6. Authority to charge each participating community its proportionate share of the treatment costs. (Section 208 (c) (2) (G));

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan. (Section 208 (c) (2) (H));

8. Authority to accept for treatment industrial wastes (Section 208 (c) (2) (I)). In addition, Section 208 (b) (2) (C) (iii) requires the areawide plan to include a regulatory program to assure that industrial or commercial wastes will not be discharged into the system unless they meet applicable pretreatment standards. Consequently an areawide waste treatment management agency should have the authority to refuse industrial wastes which do not meet pretreatment standards;

9. Authority to impose land use controls, which may include zoning regulations; subdivision regulations; flood plain zoning and regulation; environmental performance zoning; Planned Unit Development (PUD) regulations; buffer zones; conservation and scenic easements; housing and building codes; construction permits; development permits; transferable development rights (TDRs); hillside development regulations; grading regulations; taxation policies; public works policies; land conservation policies; and discharge permits. This power is required by Section 208 (c) (2) (A) which mandates that a management agency have the authority "to carry out appropriate portions of an areawide waste treatment management plan developed under (Section 208 (b))." Land use powers are required to satisfy the terms of Section 208 (b) (2) (C) (ii) and Section 208 (b) (2) (F) - (H), which deal with the control of nonpoint sources of pollution. In addition it is the policy of Congress that land use controls be considered in the water quality program. (Section 101 (b))

10. Authority to acquire land through condemnation and eminent domain, although not explicitly required, would appear at least to be contemplated by the FWPCAA. Section 208 (c) (2) (A) requires authority to carry out the areawide plan and Section 208 (b) (2) (A) states that the plan must consider requirements for the acquisition of land for waste treatment purposes.

B. In addition to the required authorities listed in A. supra., there are numerous functions ancillary to the requirements of Section 208 (c) (2) which would enhance the management capabilities of a management agency.

11. Since the requirement of Section 208 (c) (2) (H) would, in most instances, be impractical or inconsistent with the water quality goals of the FWPCAA if strictly enforced, there are several other less drastic measures which might still serve the purpose of obtaining adherence to the areawide plan. If any or all of the following authorities were possessed by management agencies, their capabilities would be greatly enhanced.

    a. Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan,

    b. Authority to impose other sanctions, criminal or civil, for noncompliance with the areawide plan such as fines, penalties, or surcharges. This power must include the authority of an agency to enforce its rules and regulations and is also an important element in the effective management of a waste treatment system. (Section 208 (c) (2) (B));

12. Authority to require communities and/or industries to participate in the waste treatment system;

13. Authority to enter, inspect and monitor the premises and the discharges of users of the system is important in the detection of pretreatment violations and the determination of

a user's proportionate share of treatment costs (Section 208 (c) (2) (E)). Owners and operators of point sources are required to monitor their own premises by the Administrator of the U.S. Environmental Protection Agency (USEPA) (Section 308);

14. Authority to contract work to other agencies, private corporations or persons;

15. Authority to employ managers, engineers, etc.;

16. Authority to insure facilities and employees;

NOTE: The authorities listed in 14-16 *supra*., enhance a management agency's capability to construct, manage and operate a waste treatment facility as required by Section 208 (c) (2) (C).

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property;

18. Authority to make, distribute or redistribute loans and grants to other agencies. (A management agency's enforcement powers are greatly increased when it has the authority to withhold monies from other agencies which fail to comply with its rules and regulations or any aspect of the areawide plan.);

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government. (This power is important in expanding an agency's geographical jurisdiction and is discussed in detail in Appendix C: "Geographical Jurisdiction and Intergovernmental Relations");

20. Authority to reassign the unused right of any industries to discharge into the system. (This authority would enhance a management agency's ability to manage effectively, Section 208 (c) (2) (B) in the event an industry decreases its use of the system, thereby avoiding unused capacity of the waste treatment system. The concomitant obligation of an industry to repay its share of treatment costs -- "industrial cost recovery" share -- should also be transferable;

21. Authority to invest elsewhere monies raised in excess of current expenditures;

22. Authority to contract for private financing;

NOTE: The authorities in 21 and 22, supra., may increase a management agency's financial soundness and increase its flexibility in financing. Section 204 (b) (1) (C) prohibits the Administrator of USEPA from approving any grant for treatment works construction unless he finds that the agency has the financial capability to insure adequate construction, operation and maintenance of the treatment works.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning;

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal. This includes planning, regulatory and operational functions;

25. Accountability to the electorate and public participation. (Section 101 (e)) (See, Appendix D: "Public Participation Requirements");

The analysis on the following pages points out that it is unlikely that one single agency will possess the legal authority or the resources to act as the sole areawide waste treatment management agency under existing legislation. The task is to determine the optimum combination of local, county, regional and state agencies to implement and manage the areawide plan. Some degree of functional fragmentation, where different agencies perform different functions, seems inevitable; however, it must be assured that there is a high degree of coordination between these agencies. Geographical fragmentation, where separate agencies perform the same tasks in different parts of the 208 area, may be acceptable in certain circumstances. An example of such circumstances would be where more than one local or county agency operates a waste treatment works within a designated 208 region. Certain functions, however, such as "planning, enforcement, and control of nonpoint sources should be performed by an agency or agencies operating throughout (emphasis added) the area." It is an important principle to remember that excessive fragmentation of functions is highly undesirable, so that consolidation of functions will probably be necessary throughout most of the nation's waste treatment areas.

The following sections examine individually the existing agencies in the State of Ohio which currently have a role in water quality control and their legal authority, either existing or potential, to accomplish the functions listed above, required by Section 208 (c) (2) and related sections of the Act.*

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* It must be recognized that the discussion here set forth is necessarily academic and that the counsel for the agencies referred to should be consulted for an authoritative view of their functions and powers.

SUMMARY

A. Required Authority

1. Authority to construct and operate a waste treatment works.

   The first authority required by Section 208 (c) of the FWPCAA, namely, constructing, acquiring and managing waste treatment facilities is an important function mandated by the FWPCAA. Political subdivisions at all levels in Ohio are given express authority which is commonly stated as the power to "construct, acquire, operate and maintain treatment and disposal works." These entities include the Ohio Water Development Authority (OWDA) at the state level; conservancy, sanitary, and water and sewer districts at the regional level; county sewers at the county level; and cities and villages at the local level. There appear to be no gaps in the legal authority required for this function.

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

   The authority to receive and accept monies from any source, including but not limited to federal grants, is a power necessary for an areawide management agency to possess. The FWPCAA contemplates that up to 75 percent of the construction costs for waste treatment facilities will be paid for by federal grants. There appear to be no gaps in the legal authority for this function. All the political subdivisions under study either expressly or impliedly possess this power.

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

   The legal authority to initiate and administer a "user charge" system as required by the FWPCAA is implied in the authority of potential waste treatment management agencies to charge reasonable rates and rentals for the use of their facilities. This section of the FWPCAA requires that all users of waste treatment facilities pay their proportionate share of operating and maintenance costs attributable to their use of the facilities. The cost will depend on such factors as the quantity and quality of the wastes discharged, peak hour demand and distance from collection and treatment facilities. USEPA regulations prohibit the allowance of bulk or quantity discount.

The political subdivisions in the study which have authority to operate waste treatment facilities also have the authority, stated in various ways, to charge, collect and alter reasonable rates and rentals for the use of their services. Under Ohio law (See Appendix P: "Public Utilities"), these charges may be based upon the cost of treatment which in turn will depend upon the quantity and quality of the discharge. Consequently, industrial users which discharge wastes containing a higher concentration of biochemical oxygen demand (BOD) and suspended solids can be charged a higher rate per volume than residential users.

Much has been written about the prohibitive monitoring and administrative costs and delays inherent in strict compliance with "user charge" provisions of the FWPCAA. Alternatives have been suggested such as charging users through an ad valorem property tax and dividing users into categories based on the characteristics of their discharges. However, a discussion of administrative difficulties is not pertinent to the legal analysis; and the political subdivisions in Ohio appear to have the legal authority necessary for strict compliance with the "user charge" requirements of the FWPCAA.

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

Unlike the "user charge" requirements, there may be both administrative and legal obstacles to complying with the industrial cost recovery

(ICR) requirements of the FWPCAA. Only the latter will be discussed in this section. As noted in Appendix B: "Public Utilities", permit fees, connection fees and special assessments are not suitable methods of charging industries for their proportionate share of the federally-funded costs of constructing waste treatment facilities. The difficulty with including ICR in the "user charge" is that it may violate the requirement of uniformity for public utility rates. Industry can be charged a higher rate per volume based on the quality of their discharges (*See* number 3, *supra*) but being assessed an additional rate increase based on the ICR requirement of the FWPCAA but unrelated to cost of treatment might contravene Ohio law. If all users -- public, industrial and residential -- were assessed their proportionate share of federally-funded construction costs (the share recovered from industry must be segregated), the rates would assuredly be held to be uniform. However, this would result in an across-the-board rate increase and would cancel the benefits of a federal grant for all non-industrial users. This probably would not be consistent with the policies and purposes of the FWPCAA.

There appear to be no legal obstacles for the political subdivisions to contract with industry to provide waste treatment serviced and to include in its terms a commitment for industry to repay its share of ICR. However, a requirement that industry contractually bind itself for a number of years to use the services of the agency may result in the industry opting to treat its own wastes and obtain a National Pollution Discharge Elimination System (NPDES) permit to discharge directly into the waters of the state. The effect of requiring binding contracts on industries treating their own wastes and the resultant loss of the agency's revenues should be considered and weighed against alternatives.

At present, the federal ICR requirement, as strictly construed, is being examined by USEPA and other interested agencies. There has been much criticism of ICR as it now stands. While remedial legislation in Ohio is needed in the area of public utility law or the enabling statutes for potential management agencies if the agencies are to be sure they have authority to comply with the ICR requirement, it is advisable that waste treatment management agencies devise a system under their current authority which will comply with the ICR requirements of the FWPCAA. It appears unlikely that USEPA would freeze progress on waste treatment works construction solely because a proposed rate structure satisfying ICR requirements might not withstand judicial scrutiny.

5. Authority to incur short-and long-term indebtedness.

The authorities included under this, heading comprise the political subdivisions authority to incur short - and long-term indebtedness. It is through the issuance of bonds and notes that the nonfederally funded costs of projects and improvements will be funded.

County sewer districts and municipal corporations have full powers to issue bonds and notes payable out of the general treasury, revenues from the project or in anticipation of the collection of special assessments. No other political subdivisions under study have the authority to issue general obligation bonds.

The OWDA has the authority to issue revenue bonds and notes which are pledged and payable solely out of its revenues. In addition, OWDA can issue bonds to pay for the construction of waste treatment works by other political subdivisions; the credit and saleability of bonds issued by a state agency is often much greater than that of regional, county or local political subdivisions.

Conservancy districts and regional sewer and water districts have the express authority to issue revenue bonds and notes; and bonds and noted in the anticipation of the collection of special assessments. Sanitary districts, on the other hand, have only the authority to issue bonds in the anticipation of the collection of special assessments. Consequently, if a water resource project were to be constructed by a sanitary district, it would be likely that money would be raised through the sale of OWDA bonds. Soil and water districts, Ohio Department of Natural Resources (ODNR), Council of Governments (COG) and regional planning commissions lack the power to incur short-and long-term indebtedness. While there are gaps in the authority to issue various types of bonds and notes, those agencies with the authority to construct waste treatment improvements seem to possess adequate means to finance the projects.

6. Authority to charge each participating community its proportionate share of the treatment costs.

The requirement of the FWPCAA that each participating community pays its proportionate share of the treatment costs can be viewed in two ways. The first is that if each individual user in a community pays its proportionate share, then the community as a whole will be paying its proportionate share. But the interpretation which seems more consistent with the FWPCAA is that communities be required to pay the proportionate share of costs attributable to treatment of wastes from their sewage systems. Communities may agree among themselves to pay shares not totally based on cost of treatment and transportation of wastes. For example, a community may agree to contribute more money for not having a treatment facility located within its boundaries. However, if there is a rational basis for the amount paid by each community, this freely agreed upon allocation of charges should be considered a "proportionate share" under the terms of the FWPCAA.

Another question which arises is the meaning of the term "community." The area so defined need not necessarily correspond exactly to a city, township, county, etc. Rather, "community" should refer to that area served by a single sewage treatment facility which in turn discharges the collected and treated sewage into the areawide waste treatment works.

None of the political subdivisions under study have the express authority to charge each participating community its proportionate share. This authority can be implied, however, from the authority of several of the political subdivisions to contract with other political subdivisions. If such contractual powers exist, there appear to be no legal barriers for the waste management agency to contractually bind participating communities to pay their proportionate share. Remedial legislation is recommended, however, to expressly authorize potential management agencies to contract with communities for the payment of their proportionate share of treatment costs. The enacted legislation should clarify or define the term "community" and specify that the proportionate share may include a mutually agreed upon allocation of costs considering factors which include but are not limited to cost of treatment and distance from the areawide facility.

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

A total refusal of wastes from a municipality for the latter's noncompliance with the areawide plan, whether related or unrelated to the use of the treatment works, is not a realistic sanction to impose for violations of the plan. Such a refusal would be inconsistent with the goals of the FWPCAA and the water quality of the region. If this were the action taken by the areawide management agency, municipalities would have no choice other than to dump untreated, or partially treated, sewage and industrial wastes into rivers, lakes and streams. Nevertheless, most of the agencies under study would have the implied authority under the rule-making and "protection of their improvement" powers to refuse wastes from a municipality when noncompliance with the areawide plan is related to use of the system. This would include a failure to satisfy pretreatment and effluent standards. However, when a municipality's noncompliance is unrelated to the use of the treatment works, such as when its zoning or subdivision regulations violate the regional land use plan, it is doubtful that the areawide waste treatment management agency could refuse to accept wastes from the municipality.[1]

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

All the political subdivisions which are authorized to own and operate waste treatment facilities possess either express or implied powers to accept industrial wastes for treatment. The political subdivisions under study, through either their express authority to issue permits as a precondition to discharge of wastes or their power to make rules and regulations to protect their improvements or the waters of the State, would appear to have the implied authority to refuse industrial wastes which do not comply with federal, state, or local pretreatment or effluent standards. However, when an industry's noncompliance is unrelated to the use of the treatment works, the authority to refuse their wastes is uncertain. Examples of such violations of the areawide plan are an industry's violations of a zoning ordinance (e.g. use of land which is prohibited); disposal of solid wastes in a prohibited manner; and failure to control nonpoint sources of pollution. It would greatly increase a management agency's powers of enforcement if it were authorized to refuse discharges from an industry for such violations of the areawide plan unrelated to use of the treatment works.

9. Authority to impose land use controls.

Aside from counties and municipal corporations, the political subdivisions in the study possessed only limited land use controls. Most notable among these are the conservancy districts and the regional water and sewer districts which may establish conservation easements, issuance of development permits for areas adjacent to the water supply, hillside development and grading regulations and the issuance of discharge permits. County land use powers are very complete within the unincorporated areas of the county and municipal corporations have complete land use powers within their areas of incorporation. These include zoning, subdivision and building regulations. Zoning laws in Ohio, however, are not written so as to specifically include environmental considerations as factors in the use of land. Although environmental protection clearly falls within health, safety and general welfare of the people, laws requiring consideration of the environmental effects of land use, would increase water quality awareness for planning and zoning.

10. Authority to acquire land through condemnation and eminent domain.

All the political subdivisions in the study which were authorized to construct and operate waste treatment works, had, in addition, express authority to acquire land through condemnation and eminent domain.

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups from any or all users in a municipality which does not comply with the areawide plan.

The authority to refuse additional "hook-ups" from any or all users in a municipality which violates the areawide plan is an important sanction which is less drastic than total refusal of municipal wastes. Where additional "hook-ups" to the municipal facility would result in overloading or the municipal facility is already in violation of rules relating to use of the areawide facility, several of the agencies under study would presumably have implied authority to prevent the connection under their rule-making and "protection of their improvements" powers. Only the Ohio Environmental Protection Agency, however, has the express authority to impose sewer connection bans (sewer moratoria) where necessary to protect the waters of the State. Remedial legislation may be needed to provide a workable method to accomplish this. OEPA notwithstanding, the other political subdivisions included in the analysis seem to lack the broad regulatory powers necessary to control the discharge of wastes into local sewers and sewerage treatment systems. At present, they presumably could impose the threat of refusal of municipal wastes if additional connections would result in new or aggravated violations of pretreatment and effluent standards. County sewer districts have the express authority to make and enforce regulations for municipal sewer system which discharge into sewage plants owned and operated by the county. It would thus appear that county sewers have the authority to impose a moratorium on municipal sewer systems which violate rules and regulations for the use of a treatment works owned and operated by the county.

In the situation where an applicant for waste treatment service which is located in a municipality in violation of the areawide plan seeks a "hook-up" directly to the regional treatment facility, it is doubtful if any areawide management agency which was examined has the authority to deny the "hook-up" solely on the basis of the applicant's location. The applicant would need to show, however, that it was located in an area serviced directly by the areawide plant and that it complied with the applicable rules and regulations of the management agency.

New legislation is needed in this area. Potential management agencies should be given express authority to require the issuance or approval of a permit to discharge as a precondition to utilizing the service of an areawide treatment facility or any facility which discharges into the areawide plant. These agencies should also be expressly authorized to prohibit additional "hook-ups" when a municipality's noncompliance with the areawide plan is unrelated to the use of the system, such as a municipality's failure to adhere to a land use plan of the regional planning agency.

11(b) Authority to impose civil or criminal sanctions.

The authority to impose criminal and civil sanctions for violations of the areawide plan is a very important method of gaining compliance with the plan and an area where the requisite power is solely lacking.

One important authority is that of OWDA to establish waste treatment facilities service areas whereby they take over the control and operation of a waste disposal facility which is in violation of a permit issued by the director of OEPA. Legislation should be enacted to grant this "take over" power to the regional, county, and local political subdivisions which have a role in wastewater management and extend to any and all violations of the areawide plan.

OEPA has extensive powers to impose civil and criminal penalties on political subdivisions and persons which violate the terms of a waste discharge permit. It also has the power to require the appointment, subject to its approval, of a competent manager when a local sewage treatment works fails to comply with OEPA pretreatment standards. The fines and penalties which OEPA is expressly authorized to impose are substantial.

The other political subdivisions under study lack authority to impose fines and penalties which would be likely to deter a large discharge into the system from abating the violations. In many instances, the maximum penalty is $1,000 or less. In these cases, it is often more economical for an industry to pay the fine than install costly equipment necessary to comply with pretreatment standards. Counties and municipal corporations, however, under their police powers, would presumably have the authority to adopt ordinances and impose civil and criminal penalties for violation of rules and regulations relating to the use of the treatment works.

The authority of any agency operating a waste treatment works to levy a surcharge should be implied when these added charges are based on increased costs of treatment related to the quality of the effluent discharged into the system. Furthermore, a waste treatment management agency, if authorized to sue and be sued, should have the implied authority to sue a user for damages caused by misuse of the system.

However, surcharges and damages are compensatory rather than punitive in nature, and thus would have little effect of enforcing provisions of the areawide plan. A majority of the political subdivisions in the analysis are expressly authorized to sue and be sued.

In conclusion, remedial legislation should be enacted to strengthen the authority of waste treatment management agencies to impose civil and criminal penalties. An increase of this authority would greatly aid enforcement of the provisions of the areawide plans.

12. Authority to require communities and/or industries to participate in the waste treatment system.

The authority to require political subdivisions and private industry to participate in the areawide waste treatment system is an important power from the standpoint of regulating and controlling discharges into the state's waters. In some instances, the areawide management agency may deem it desirable for certain industries to treat their own wastes. However, in planning the capacity of the treatment facility, it may be important to be assured that those political subdivisions and industries in the area utilize the system. In addition, the management agency will be in a better position to monitor and control pretreatment of wastes, determine that effluent standards are being met and impose sanctions for violations of the areawide plan.

Only two political subdivisions have the express authority to require property owners to use the system when improvements have been made to serve their property. The authority for sanitary districts includes "public corporations and persons." The authority of regional water and sewer districts is framed in terms of the "owner of a premises which is accessible to a water resource project." There is some question whether the latter authority would cover a municipal treatment works. In any event, this authority is not one likely to be implied as necessary to the carrying out of a power expressly granted. Remedial legislation should be considered for all potential waste treatment management agencies to empower them to require, similar to that of sanitary districts, public corporations and persons to utilize the system.

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

The only political subdivision under study which has express authority to enter and inspect public and private users of waste treatment works and require users to monitor their own discharges is OEPA. Under Ohio law, however, public utilities may make reasonable rules and regulations regarding the use of the system, including the requirement that users monitor their own discharges into the system (See Appendix B: "Public Utilities," Duty to Serve). The authority to enter and inspect can be reasonably implied when an agency has the power to make rules and regulations to prohibit the discharge of any wastes deemed detrimental to the works and improvements of the agency. Several of the political subdivisions studied had such rule-making powers including conservancy districts, regional water and sewer districts, and county sewers. Remedial legislation, however, would be advisable to give all potential waste treatment management agencies the express power to enter, inspect and monitor users of the system and to sample their discharges into the system. Such legislation would prevent any potential litigation over a disputed right to enter, inspect, sample wastes, and monitor the premises of a user.

14. Authority to contract work to other agencies, private corporations or persons.

The authority to contract work to other persons, private corporations or agencies is necessary for the accomplishment of various functions contemplated by the FWPCAA including, but not limited to, the construction of waste disposal facilities. There are no legal gaps for this authority. For all the political subdivisions under study this power was either expressed or implied as necessary to carry out other powers and duties expressed in the enabling legislation. This authority, however, is not unlimited in all cases. For example, some of the enabling statutes require competitive bidding procedures to be followed when the contract exceeds a specified amount.

15. Authority to employ managers, engineers, etc.

There appear to be no legal gaps in the authority of political subdivisions under study to employ managers, engineers, etc. As noted in Appendix A: "Express and Implied Powers", this is considered an inherent power of political subdivisions in Ohio. Some of the agencies are given express authority to employ certain types of personnel. However, there should be no impediment for any political subdivision in Ohio to employ any manager, engineer, etc., reasonably necessary to carry out the duties and powers expressed in its enabling legislation.

16. Authority to insure facilities and employees.

Only two political subdivisions in the study, OWDA and regional water and sewer districts,are expressly authorized to insure facilities and employees. This power, however, is considered to be inherent in the existence of an agency (See Appendix A: "Express and Implied Powers") and possessed by all agencies under study. Consequently, there appear to be no gaps in the legal authority to perform this function.

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

All political subdivisions which have the authority to construct and operate waste treatment works are also given the express authority to acquire by gift or purchase, hold in fee or leasehold, and dispose of real and personal property.

18. Authority to make, distribute or redistribute loans and grants to other agencies.

The authority to make loans and distribute or redistribute grants can be an effective means of enforcing the areawide plan.

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

All the political subdivisions under study are either expressly or impliedly authorized to enter into contracts with the state and/or federal government. For a more detailed discussion, Appendix C: "Geographical Jurisdiction and Intergovernmental Relations" should be referenced.

20. Authority to reassign the unused right of any industries to discharge into the system.

The authority to reassign any unused right of an industry to discharge into the system is important for two reasons. First, it may well be more consistent with the goals of the FWPCAA if the management agency is able to operate at full capacity should it choose to; and not be required to reserve an industry's right to discharge which the latter has not present or immediate need for. Second, if an industry's obligation to pay its share of industrial cost recovery is based on its use of the system and not its contractual right to discharge into the system, any unused industrial right to discharge would result in less revenues recovered from industry to repay the federally funded share of construction costs.

None of the political subdivisions studied have express authority to reassign an unused right to discharge, which can be referred to as a "transferability provision." There seems to be little doubt, however, that both the areawide management agency and an industry can bilaterally agree to reform a contract to discharge when an industry decreases its use of the system. This right to discharge and concomitant obligation to pay a share of industrial cost recovery could then be transferred to another industry which desires new or increased use of the waste treatment system. Where an industry wishes to retain an unused right to discharge into the system, however, it is doubtful that a management agency, without express authority, can unilaterally require an industry to relinquish that right and transfer it to another potential user. Therefore, remedial legislation may be needed in this area.

21. Authority to invest elsewhere monies raised in excess of current expenditures.

Only two political subdivisions under study, OWDA and regional water and sewer districts, are expressly authorized to invest elsewhere monies raised in excess of current expenditures. Furthermore, these authorized investments are limited to federal and state obligations. A gap in this authority, however, is not of great importance for implementation of the FWPCAA.

22. Authority to contract for private financing.

The authority to contract for private financing is lacking for most agencies. Sanitary districts are empowered to borrow money to finance preliminary work. This power is not of great importance, however, where the potential management agency is vested with other means of financing, such as the issuance of revenue bonds.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

All of the political subdivisions in the study, with the exception of OWDA, are delegated some express power to prepare plans related to water quality. The most comprehensive land use planning powers are held by COGs and regional, county and city planning commissions.

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

Political subdivisions at all levels possess powers relating to residual waste management and solid waste disposal. OEPA is responsible for the state-wide regulatory scheme while OWDA has the express authority to make and enforce rules and regulations, own and operate, and finance solid waste disposal facilities. Sanitary districts are the primary regional agency with authority in this area. Counties may engage in solid waste disposal activities through the formation of County Garbage and Refuse Disposal Districts. These districts may also operate in municipalities with the consent of the latter. Finally, boards of health, which may be formed for both cities and counties, have important duties relating to licensing and inspection.

The major problem in this area seems not be be gaps in jurisdiction, but overlapping jurisdictions at the four levels of government. Mechanisms to coordinate solid waste disposal with waste water management must be provided for in the 208 areawide plan.

25. Requirements to consider public input before adopting plans, rules and regulations.

While there appear to be no legal barriers for any of the political subdivisions in the analysis to adopt public participation requirements such as those listed in Appendix D, only OEPA, at present, is statutorily required to do so. Many of the political subdivisions currently have notice and hearing requirements prior to adoption of their official plans, but most of the public participation procedures fall far short of the guarantees listed in the federal regulations. While these regulations apply only to state-level agencies, the accountability to the public would be improved if similar regulations were adopted by all management agencies.

FOOTNOTES

1. The United States District Court for the District of Kansas in Uhl v. Ness City (44 L.W. 2282, decided December 5, 1975) found it is unconstitutional for local governments to stop providing water to residents because of unpaid mandatory solid waste collection bills.

The Court declared that all such ordinances are a violation of the due process clause of the 14th Amendment. The Court held the ordinances oppressive and a threat to health, stating:

> "By threatening to deprive residents of water, an absolute necessity of life, in order to collect a service charge for other municipal functions, the defendant cities have chosen an . . . oppressive collection method."

The Court reasoned that the ordinances had no reasonable relationship to their purpose of improving the living conditions of city residents by providing mandatory garbage collection.

CONCLUSIONS

1. Adequate authority exists at all levels to construct, own, and operate waste treatment facilities.

2. Any problems in adopting a "user charge" system as required by the FWPCAA appear to be administrative rather than legal.

3. Authority to satisfy the "industrial cost recovery" requirements of the FWPCAA is uncertain. The answer, to a large extent, depends upon the applicability of public utility doctrine in Ohio to waste treatment plants operated not-for-profit by governmental entities.

4. The 208 management agencies may not be able to refuse municipal and industrial wastes when their noncompliance is unrelated to the use of the treatment system (e.g., violation of land use regulations; violation of solid waste disposal permit requirements).

5. Remedial legislation may be needed to allow 208 management agencies to impose sewer moratoria in municipalities which violate any aspect of the areawide plan. Of the political subdivisions included in this study only OEPA has this express power.

6. Potential 208 management agencies could use greater powers to impose civil and criminal penalties for violation of their rules and regulations.

7. 208 management agencies may need authority to require persons and industries to participate in the areawide waste treatment system when in the interest of the health, safety and general welfare of the people.

8. Where gaps in the legal authority exist, it is advisable that 208 management agencies be given the express authority to enter, inspect and monitor the premises of the system's users.

9. The 208 management agencies should have authority to withhold federal and state grants and other funds from local agencies which are in violation of significant aspects of the areawide plan.

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10. Public participation requirements and procedures similar to those listed in Appendix D should be adopted by 208 management agencies.

11. Land use legislation which provides for the amortization or "phasing-out" of existing, nonconforming uses should be enacted. It would be helpful if the water quality of the region were a permissable basis for zoning laws.

12. An institutional arrangement providing for the cooperative management of the areawide water control process through an appropriate regional agency would appear to be essential to satisfy the requirements and purposes of the FWPCAA.

Ohio Environmental Protection Agency

The Ohio Environmental Protection Agency (OEPA) is the state-wide agency in charge of the abatement of water and air pollution and the disposal of solid wastes. In general, most of the enabling legislation deals with administrative review procedures for persons adversely affected by OEPA decisions (ORC Sections 3745.02 et. seq.). In addition, OEPA has broad powers of administration and management under Chapters 3745 (Environmental Protection Agency) and 6111 (Water Pollution Control of the Ohio Revised Code - hereinafter, ORC). Section 3745.01 of the ORC authorizes OEPA, under supervision of the director, to

> administer the laws and regulations pertaining to the prevention, control and abatement of . . . water pollution, public water supply, comprehensive water resource management planning, and the disposal of solid wastes, sewage, industrial waste, and other wastes.

A. Required Authority

1. Authority to construct and operate a waste treatment works.

   However, nowhere in the enabling statutes does OEPA have the express power to construct, operate, and maintain waste treatment works. And, despite its broad general powers, a reading of Section 3745.01 in conjunction with the more specific delegation of powers to OEPA in Chapters 3745 and 6111 of the ORC should lead to the conclusion that the authority of this agency to construct, operate, and maintain waste treatment plants should not be implied. The totality of the legislation seems to envision OEPA as an agency with administrative, regulatory, and planning functions rather than an agency which has operational duties.

   If the power of OEPA to construct and operate waste treatment works is to be implied, there are three sections of Chapter 3745 which, read together, might possibly grant this authority. Section 3745.011(B) of the ORC authorizes OEPA to

> prevent and abate pollution of the environment for the protection and preservation of health, safety, welfare, and property of the people and the state.

Section 3745.01(C) allows the agency to

> enter into agreements for the utilization of the facilities and services of other departments, agencies, and institutions, public or private.

Finally, Section 3745.01(E) authorizes the agency to

> accept on behalf of the state and deposit with the treasurer of state any grant, gift, or contribution made for air or water pollution control, public water supply, water resource planning, waste disposal or treatment, or related purposes, and expend the same for such purposes.

An argument can be made that the word 'expend' in Section 3745.01(E) authorizes OEPA to construct sewage and waste treatment works. But this interpretation is believed to be erroneous when read in conjunction with several sections of Chapter 6111 which comprise the water pollution control laws of the State of Ohio. First, Section 6111.03(D) empowers OEPA to "administer state grants for the construction of sewage and waste collection and treatment works." The word 'administer' means, if anything, that OEPA is required to distribute grants for waste treatment works to other state, regional or local agencies rather than expend the funds itself for such construction. More to the point, however, is Section 6111.13 entitled "Control of Public Water Supplies by Environmental Protection Agency" which states:

> The environmental protection agency shall exercise general supervision (emphasis added) of the operation and maintenance of the public water supply and water-works systems throughout the state . . . Such

> general supervision shall include all features of construction, operation, and maintenance of systems for supply, treatment, and storage, and distribution, which do or may effect the sanitary quality or fluoride content of the water supply.

These two sections make clear that OEPA's role in conjunction with public waste treatment works is restricted to general supervision and that active management of a waste treatment works is ultra vires to the agency. Moreover, any grants received from any source for the purpose of construction, operation, or maintenance of waste treatment facilities by OEPA must be distributed to the appropriate agencies and cannot be expended directly by OEPA for these purposes. Thus, any authority implied from Chapter 3745 to operate, construct, or maintain waste treatment works is negated by the limiting provisions of Sections 6111.03(D) and 6111.13 delineating OEPA's role in the management of waste treatment facilities as that of general supervision.

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

   Section 3745.01(E) authorizes OEPA to accept on behalf of the State (emphasis added) monies from any source which includes federal grants. Section 6111.03(C), dealing with the power to administer federal and other grants and Section 6111.03(D), dealing with the power to administer state grants, necessarily implies the power to accept these monies.

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

   The OEPA has no express power to raise revenues, including the assessment of waste treatment charges. This requirement of the Act mandates that the management agency has the power to assess users on the basis of the cost of the treatment and comply with the "industrial cost recovery" requirement of the FWPCAA. Since these powers will be implied, if at all, from the authority to operate a waste treatment works, the authority of OEPA to exercise these powers cannot be implied.

5. Authority to incur short-and long-term indebtedness.

The OEPA has no express authority to incur short-and long-term indebtedness. In order for a political subdivision to possess any of these powers, it must be expressly authorized by constitution or statute. However, OEPA does have the power to authorize, when the director finds that an emergency exists, a municipal issue of bonds without voter approval (Section 6111.29), without regard to the one percent limitation (Section 6111.29(B)), and without regard to the five percent limitation (Section 6111.29(C)).

6. Authority to charge each participating community its proportionate share of the treatment costs.

The OEPA has no power to charge each participating community its proportionate share of the treatment costs. The power to assess "user charges" is incident to the power to operate a waste treatment works.

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

The OEPA has no authority to refuse wastes from a municipality or industry. However, it can make it unlawful for any municipality or industry to discharge into the waters of the state or into a regional waste treatment works, by denying or revoking a permit to discharge. OEPA has plenary powers in this respect. It may deny or refuse to renew a permit if in the words of Section 6111.03(J)(2)

> (2) the director determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with Section 208 of the FWPCAA of 1972.

9. Authority to impose land use controls.

The OEPA's land use powers are limited to a possible control of the location of point sources through its power to issue discharge permits.

10. Authority to acquire land through condemnation and eminent domain.

The OEPA has no power, express or implied, to acquire land through condemnation or eminent domain.

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

The OEPA possesses the authority to prevent additional "hook-ups" or impose a moratorium for any or all users in a municipality which does not comply with the areawide plan. Section 6111.042 empowers OEPA to

> (a)dopt and enforce . . . regulations setting forth and requiring compliance with national effluent limitations, national standards of performance for new sources, and national toxic and pretreatment effluent standards, as necessary to insure compliance with the (Act).

Pursuant to these rule-making and enforcement powers, OEPA has promulgated connection ban standards (OEPA Regulations EP-8). Section EP-8-02(C) states that the connection ban shall be imposed upon both:

> (1) the person responsible for the construction and operation of the treatment works and sewerage system in the geographical area specified, and

(2) the person responsible for the issuance of permits to construct or install new connections or treatment works.

There are two types of bans: standard connection bans (EP-8-02(E)) and special connection bans (EP-8-02(F)). Standard bans prohibit "the person upon which it is imposed from causing or allowing the extension of or additional connections to the sewerage system." Special bans prohibit "the person upon which it is imposed from causing or allowing construction or installation of home sewage disposal systems."

The director of OEPA may impose connection bans wherever he determines that the additional connections or extensions of a sewerage system or home sewage disposal system will increase the effluent concentration of the wastes discharged into the waters (EP-8-03(A), (B)).

The connection bans do not apply to sources whose foundations have already been laid prior to the ban or when the necessary permits and approvals have already been issued (EP-8-02(H)(1), (2)).

Thus, within the limitations of the regulations, OEPA can impose a moratorium on additional sewer "hook-ups" within a geographical area. It is clear, however, that the noncompliance must be related to the use of the treatment works and discharge into the state's waters. If a municipality's noncompliance is unrelated to the use of the treatment works (e.g., land use controls inconsistent with the areawide plan) OEPA lacks the power to cause to be refused additional "hook-ups" to the treatment works.

11(b) Authority to impose civil or criminal sanctions.

The OEPA has numerous express enforcement powers. Pursuant to Section 6111.03(L), the agency may institute an action in any court of competent jurisdiction to compel compliance with any orders of the director (of OEPA) or with Sections 204 (b), 307, and 308 of the FWPCAA. Section 6111.07 authorizes the Ohio Attorney General to bring an action for damages or injunction for violation of any order, regulation, or condition of the director or the terms of any permit. Section 6111.07(A) states that each day of violation constitutes a separate offense.

Section 3745.011(F) states that OEPA shall

> Provide for enforcement of the right of the people to environmental quality consistent with human health and welfare.

OEPA has express authority to impose civil and criminal sanctions for noncompliance with certain aspects of the areawide plan. Section 6111.09 imposes a maximum civil penalty of $10,000 to be paid to the state treasury for non-compliance with the terms of the permit or acts of pollution without a permit, under Section 6111.04. The latter section does not apply, however, to:

> (E) the discharge of sewage, industrial waste, or other wastes into a sewerage system maintained by a state or political subdivision.

Furthermore, the Section does not apply to sewage from dwellings up to three units of size (Section 6111.04(F)); sewage and nonpoint sources of pollution from the recovery and processing of sand and gravel (Section 6111.04(A)); any material injected into a well for the production of oil and gas (Section 6111.04(B)); and most sources of nonpoint pollution, such as fertilization, from agriculture (Section 6111.04(C), (D)). Section 6111.99 establishes criminal penalties for acts of pollution of Section 6111.04, subject to its limitations, of a maximum fine of $25,000 and/or one year imprisonment. Section 6111.20 authorizes the director of OEPA to order the manager of a local sewage treatment works to produce and discharge an effluent of acceptable standards. If such manager does not or is not able to meet required standards within ten days after the order, the director of OEPA is empowered to require the manager to appoint, subject to the director's approval, and pay the salary of a competent person to manage the local treatment facility.

Section 6111.30 empowers the director of OEPA to fine any person, legislative authority, officer of a municipal corporation, or department a sum of $10,000 if he fails to comply with an order to perform an act required by Chapter 6111 within a period of 30 days.

12. Authority to require communities and/or industries to participate in the waste treatment system.

The OEPA has no express authority to require communities and/or industries to participate in the waste treatment system. However, because OEPA has the express power to issue permits for the discharge of wastes (Section 6111.03(J)) and to issue industrial water pollution control facility certificates (Section 6111.31), it may have some leverage in convincing industry and local governments not to treat their wastes totally outside of the regional system, but rather to integrate them with the system.

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

The OEPA has, under Sections 6111.03(J) and 6111.04, express authority to enter, inspect and sample the discharges of all public and private entities which discharge wastes into the waters of the State. OEPA also has the express authority to require users of the system to monitor their own wastes. Section 6111.03(J) states in part:

> The director may condition permits upon the installation of discharge or water quality monitoring equipment or devices and the filing of such periodic reports on the amounts and contents of discharges and the quality of receiving waters as the director prescribes.

14. Authority to contract work to other agencies, private corporations, or persons.

The OEPA has express authority under Section 3745.01(C) to

> Enter into agreements for the utilization of the facilities and services of other departments, agencies, and institutions, public or private.

Such contracts,however, may only apply to purposes which OEPA is authorized to perform in Chapters 3745 and 6111 which is basically the regulation and control of pollution. Thus, their power extends to contracting for legal, technical, management, consulting services, etc.,and for utilizing facilities such as testing and monitoring. The contracting for experts on a part-time basis is also expressly authorized by Section 3745.01(C).

15. Authority to employ managers, engineers, etc.

The power to employ managers, engineers, etc., should be an inherent power for an agency of this nature (*See*, Appendix A: "Express and Implied Powers," n. 23). *See also*, Section, 6111.03(E).

16. Authority to insure facilities and employees.

It should also be an inherent power to insure employees and the facilities which OEPA is authorized to own.

17. Authority to acquire by gift or puchase, hold in fee or by leasehold, and dispose of real and personal property.

The OEPA has no express or implied powers to own or hold real estate.

18. Authority to make, distribute or redistribute loans and grants to other agencies.

Section 6111.03(D) expressly authorizes OEPA to administer state grants for the construction of sewage and waste collection and treatment works; Section 6111.40 expressly authorizes OEPA, upon application from municipalities, counties, or special districts, to appropriate monies to them for the design, acquisition, construction, alteration, and improvement of treatment works.

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

The authority to enter into contracts with the federal government is necessarily implied by OEPA's authority to receive and administer federal grants (*See* number 2.17, *supra*.). The same holds true with authority to enter into contracts with state governments. Being an administrative agency of the State of Ohio, authorization to enter into contracts with the Ohio State government would be superflouous.

20. Authority to reassign the unused right of any industries to discharge into the system.

The OEPA has no authority to reassign the unused right of any industry to discharge into the waste treatment system as this power is incident to the operation and management of the system.

21. Authority to invest elsewhere monies raised in excess of current expenditures.

Section 6111.03(C) states that all OEPA monies from the administration of grants shall

> be deposited in the state treasury, and kept by the treasurer of the State in a separate fund subject to the lawful orders of the director.

By the principle of *expressio unius est exclusio alterius*, OEPA may not invest monies elsewhere.

22. Authority to contract for private financing.

The OEPA has neither express nor implied authority to contract with private parties for financing.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

Pursuant to Section 6111.03(A), OEPA is expressly authorized to

> (d)develop plans and programs for the prevention, control and abatement of new or existing pollution of the waters of the state.

This would seem to imply that OEPA has the power to develop land use arrangements which relate to the prevention of water pollution. However, they have not power to impose land use controls such as zoning and subdivision regulations.

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

The OEPA's responsibilities in the solid waste management field are largely covered by Chapter 3734 of the ORC. The director of OEPA, pursuant to Section 3734.02(A) is required to adopted regulations to govern solid waste disposal sites and facilities, inspections, and the issuance of licenses. The interrelationship between solid waste disposal and water quality is recognized in OEPA Regulation EP-20-04 which governs the location of solid waste disposal sites and facilities. Subsection (A) states that

> solid waste disposal sites and facilities shall not be located in areas where they constitute a hazard to the quality of the ground-water or surface water resources or create a health hazard.

Subsection (B) states

No person shall place or dispose of solid wastes in any ditch, stream, river, lake, pond or other watercourse, except those waters which do not combine or effect a junction with natural surface or underground waters, or upon the banks thereof where the same is liable to be washed into the water by ordinary flow or annual floods. This authority does not apply to the placing of any substance under authority of a permit issued by the water pollution control board. OEPA Regulation EP-20-05 lists the allowable methods of solid waste disposal: (a) sanitary landfill; (b) use of an incinerator; (c) composting; and (d) garbage feeding to swine and poultry. In addition, other methods may be developed which"(demonstrate the capability) of fulfilling the basic requirements for minimizing potential for pollution of surface water or ground water (emphasis added) . . ." (EP-20-05(E)). When plans are submitted to the director of OEPA for the approval of a sanitary landfill site, it must be assured that such operations will not "cause or contribute to pollution of the surface water or ground water." (EP-20-07).

Other duties of the director of OEPA in the area of solid waste disposal include the administration of the licensing and inspection procedures (ORC, Section 3734.03(B)); and the approval of plans detailing the site, facility, and method of operation (Section 3734.03(C)). Plan approval and licensing procedures and requirements are detailed further in Section 3734.05. Finally, upon a complaint by the director of OEPA, the attorney general, county prosecutor, or city attorney may prosecute any person in violation of any provision of Chapter 3734 (Section 3734.10).

25. Requirements to consider public input before adopting plans, rules and regulations.

With respect to the accountability to the electorate, the director of OEPA is appointed according to the procedure under Section 121.03 of the ORC.

The Environmental Board of Review consists of three members appointed by the Governor, with the advice and consent of the senate; they serve for six year terms and no more than two may be from the same political party (Sections 3745.03 et. seq.). The Board of Review conducts hearings on proposed OEPA rules and regulations and hears appeals from any party adversely affected by an order of the director regarding discharge permits, pretreatment requirements, etc. The duties and authority of the Board of Review are not subject to the Ohio Administrative Procedure Act, Chapter 119 of the ORC, *infra*.

In addition, the director may designate a member of his staff as an ombudsman between himself and the citizens of Ohio in all matters concerning the environment (Section 3745.011). The adoption, modification, and repeal of all OEPA regulations must conform to the procedure required by Chapter 119 of the ORC (the Ohio Administrative Procedure Act) (Section 6111.03(G)). Section 119.03(A) requires reasonable public notice of at least thirty days prior to the date set for the hearing on whether or not to adopt, amend, or repeal rules and regulations. Such notice must include: (1) a statement of the agency's intentions; (2) a general synopsis of the proposed rule, amendment, or rule to be repealed; and (3) the date, time and place of a hearing on the proposed action. A full text of the proposed rule, amendment, or rule to be repealed shall be filled at least thirty days prior to the hearing with the secretary of state and shall also be available for public inspection at the acting agency (Section 119.03(B)).

The public hearing is a major public participation requirement of OEPA's rule-making procedures. The hearing requirements are covered in Section 119.03(C) and are applicable to all Ohio administrative agencies. This subsection states in part that

> (a)ny person affected by the proposed action of (OEPA) may appear and be heard in person, by his attorney, or both, may present his position, arguments, or contentions, orally or in writing, offer and examine witnesses, and present evidence tending to show that said proposed rule, amendment, or recision, if adopted or effectuated, will be unreasonable or unlawful.

If the agency adopts, amends or rescinds the proposed rule, it shall designate an effective date which shall be no earlier than ten days after the filing of the action with the Secretary of State pursuant to Section 119.04 (Section 119.03(D)). Prior to the effective date, reasonable effort shall be made

> to inform those affected thereby and to have available for distribution to those requesting it the full text of the rule as adopted or as amended.

Section 119.05 requires that

> Each agency . . . compile currently, published, and at all times have available for distribution in book or pamphlet form all laws administered by it, all rules of general and uniform operation promulgated by it . . . Such book or pamphlet shall be furnished to any person who requests it, without charge, or upon payment of a charge not to exceed the actual cost of printing . . .

There are additional public participation provisions specifically applicable to the director of OEPA. He is expressly authorized by Section 6111.03(E) to

> (e)ncourage, participate in, or conduct studies, investigations, research and demonstrations relating to water pollution, and the causes, prevention, control, and abatement thereof . . .

Furthermore, the director may

> (a)dvise, consult and cooperate with other agencies of the State, the federal government, other states, and interstate agencies, and with affected groups, political subdivisions, and industries (emphasis added) in furtherance of the purpose (of the ORC) . . . (Section 6111.03(B)).

In addition, the director is encouraged to mail a copy of any proposed standard or regulation to interested state-wide organizations and any other person who requests a copy; and to

> consult with appropriate state and local government agencies or their representatives, including state-wide organizations of local government officials, industrial representatives, and other interested persons . . . (Section 6111.03(B)).

Section 6111.03(F) authorizes the director to "(c)ollect and disseminate information relating to water pollution and prevention, control, and abatement thereof."

Section 3745.07 requires the director of the OEPA to maintain a current mailing list of persons subscribing for modification of all applications for issuance or renewal of permits, licenses, and variances, complaints filed, and public hearings.

Section 3745.08 establishes a procedure for citizen complaints whereby a person adversely affected or aggrieved by what is alleged to be a violation of a valid OEPA rule or regulation can file such complaint with the director of OEPA. The director is required to take prompt investigatory action and, if probable cause for the violations exists, to initiate proper legal proceedings.

In conclusion, statutory authority exists for several of the public participation requirements listed in 40 CFR 105. There appears to be no legal barrier, however, for OEPA's total compliance with these regulations (See, Appendix D).

Ohio Water Development Authority

The enabling legislation for the Ohio Water Development Authority (hereinafter, OWDA) is contained in Chapter 6121 of the ORC. In addition to the powers expressed, the Chapter contains an "elastic clause," Section 6121.04(S) which states that OWDA has the authority to "Do all acts necessary and proper to carry out the powers expressly granted in Chapter 6121 . . ." In addition, Section 6121.22 states that "Sections 6121.01 to 6121.22 . . . being necessary for the welfare of the state and its inhabitants shall be liberally construed to effect the purposes thereof." A reading of these two sections would seem to indicate that the Ohio General Assembly intended that powers of OWDA be reasonably implied from those expressed powers and purposes. In other words, the powers of OWDA should be more liberally construed than if the above two provisions were not included in the Chapter.

A. Required Authority

1. Authority to construct and operate a waste treatment works.

   The OWDA has the express power to

   > Acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate . . . water development projects, and establish rules and regulations for the use of such projects. (ORC, Section 6121.04(F))

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

   The OWDA has express authority to receive monies from any source, including the federal government. Section 6121.04(N) of the ORC authorizes OWDA to

   > Receive and accept from any federal agency, subject to the approval of the governor, grants for or in aid of the construction of any water development project or for research and development with respect to wastewater or water management facilities, and receive and accept

aid or contributions from any source of money, property, labor, or other things of value, to be held, used and applied only for the purposes for which such grants and contributions are made.

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

   The OWDA has express authority to charge, alter, and collect rentals for the use of any of its projects under Sections 6121.04(Q) and 6121.13. Such charges are not subject to the supervision of any other state agency (Section 6121.13). Because OWDA has express authority to fix the terms of the rentals, it can be reasonably implied that it has the power to base the charges on the cost of treatment or the characteristics of the effluent (See, Appendix B: "Public Utilities").

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

   As with the other political subdivisions under study, the authority of OWDA to amortize the federally-funded portion of construction costs of waste treatment works attributable to private industry, known as "industrial cost recovery," may be a problem area. The OWDA has no express authority to recover these costs through the levy of special assessments. The rule in Ohio is that the power to impose special assessments must be clearly conferred. And, it cannot be said that the levy of special assessments is even reasonably necessary to carry out the powers expressly granted to OWDA. Therefore, it must be concluded that OWDA lacks the power to accomplish "industrial cost recovery" through special assessments.

   Since the power to levy a property tax must be expressly granted, OWDA also has no authority to carry out "industrial cost recovery" requirements through this method.

Pursuant to authority granted by Section 6121.13, OWDA has the power to

> Charge, alter, and collect rentals or other charges for the use or services of any water development project and contract in the manner provided in this section with one or more persons . . . desiring to use the services thereof, and fix the terms, conditions, rentals, or other charges for such use or services.

Because of the liberal construction given to OWDA powers by Section 6121.22, it may reasonably be implied that OWDA has the authority to contract with private industry for the payment of connection fees and permit fees for the use of the waste treatment plan. But fees for permits are already determined by the schedule contained in the OEPA Regulations (EP-39-0s, 03) and the connection fee must be based on the cost of the "hook-up" (See, Appendix B: "Public Utilities"). Thus, these charges would not be of much aid to OWDA in the recovery from industry of the federally-funded share of construction costs attributable to it.

Since OWDA is authorized to issue water development revenue bonds (Section 6121.10, infra.) which are to be retired from rentals charged for the use of the waste treatment works, OWDA would have the authority to amortize the cost of construction through "user charges." But the authority to single out industry to pay a higher rate for treatment services, which is not based on the cost of treatment or the characteristics of the effluent but rather on the federal policy of recovering construction costs only from private industry, is uncertain (See, Appendix B: "Public Utilities," Industrial Cost Recovery, for a discussion of the problems in this area which are applicable to OWDA).

Section 6121.04(L), which gives OWDA full contractual powers in the carrying out of its duties, would authorize OWDA to enter into a binding agreement with private industry to recover the latter's share of the federally-funded portion of construction costs. However, as noted in the Appendix B, the effect which this policy would have on industry opting to treat their own wastes cannot be overlooked.

5. Authority to incur short-and long-term indebtedness.

The OWDA has express authority to issue revenue bonds, known as water development revenue bonds pursuant to Sections 6121.04(H) and 6121.06. The latter section states that these bonds shall be pledged by and payable solely out of the revenues of OWDA. They shall have ". . . all the qualities and incidents of negotiable instruments . . ." They shall be issued to pay for the costs of water development projects whenever deemed necessary by OWDA. Section 6121.06 also empowers OWDA to issue renewal notes and water development revenue refunding bonds for the purpose of purchasing and redeeming the revenue bonds to be refunded.

The OWDA does not have the authority to issue general obligation bonds backed by the full faith and credit of the state or political subdivisions. This authority is expressly denied OWDA by Section 6121.10 which states that

> (these) sections do not authorize (OWDA) to incur indebtedness or liability on behalf of or payable by the state or any political subdivision thereof.

The OWDA has the express authority to issue bond anticipation notes, referred to in the ORC as renewal notes. These notes are to be repaid through the issuance of revenue bonds (Section 6121.06). Since OWDA lacks the power to levy special assessments, it consequently lacks the authority to issue notes in anticipation of the collection of special assessments.

6. Authority to charge each participating community its proportionate share of the treatment costs.

The OWDA has the authority, pursuant to Sections 6121.04(G), (Q) and 6121.13 to charge each participating community its proportionate share of the costs of treatment. Section 6121.04(Q) authorizes the OWDA to (c)harge, alter, and collect rentals and other charges for the use or services of any water development project." Section 6121.04(G) empowers OWDA to "(m)ake available the use or services of any water development project to one or more persons, . . . governmental agencies, or any combination thereof." Section 6121.13 provides for the cooperation among governmental agencies for the construction and operation of waste treatment works. The parties to the agreement may decide among themselves the contribution to be paid by each. These sections authorize OWDA to charge each community its proportionate share.

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

The OWDA lacks express authority to refuse wastes from a municipality which fails to comply with the areawide plan irrespective of whether or not the noncompliance is related to the use of the waste treatment system. However, pursuant to OWDA's authority to operate a waste treatment plant and the authority in Section 6121.04(S) to do all acts necessary and proper to carry out this express power, it may be reasonably implied that OWDA has authority to make rules and regulations relating to, among other things, the pretreatment of wastes from all users. Supporting this contention is the liberal construction given to Chapter 6121 by Section 6121.22 in view of the state policy of the protection of water resources in Section 6121.03. Thus, authority may be implied to refuse wastes from a municipality when its noncompliance is related to the use of the waste treatment works. However, if a municipality's noncompliance is unrelated to the use and operation of an OWDA waste treatment project, the refusal of municipal wastes would probably not be an act necessary or proper for the carrying out of one of OWDA's express powers. Thus, such authority would probably not exist absent express authorization.

In cases where the director of OEPA determines that a municipality, other governmental, or private user is in noncompliance with the terms of its permit to discharge, he may request OWDA to establish a wastewater facilities service area (Section 6121.041). The violation must be one in which the director determines creates a public nuisance, as defined in Section 6121.04 and adversely affects residents of a political subdivision other than the one served by the disposal system in default. Where such an area is established, it is implicit that OWDA accept the wastes of the permit violators and assess their rates, rentals, and charges when due. "Public nuisance" under Section 6111.04 does not apply to sewage and industrial wastes being discharged into a sewage system of the state or a political subdivision nor runoff of materials applied to land for agricultural purposes.

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

The authority of OWDA to accept for treatment industrial wastes can be implied from Section 6121.04(G) which authorizes OWDA to

> (m)ake available the use or services of any water development project to one or more persons, one or more governmental agencies, or any combination thereof.

A related power is granted in Section 6121.04(L) which authorizes OWDA to

> (m)ake and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its powers under Chapter 6121 . . .

When an industry violates federal or state pretreatment standards, OWDA, pursuant to its rule-making powers, has the power to refuse to accept for treatment wastes from that noncomplying industry (See, Appendix D: "Public Utilities," Duty to Serve). When the industry is in noncompliance with a part of the areawide plan which is unrelated to the use of the treatment works, OWDA lacks the authority to refuse its wastes.

9. Authority to impose land use controls.

The OWDA has no authority to develop or impose land use controls. Most of these controls, such as zoning and subdivision regulations and building permits, since they restrict the private use and enjoyment of land, are derived from police powers which must be delegated by the state by statute or constitution.

10. Authority to acquire land through condemnation and eminent domain.

The OWDA has express powers of condemnation and eminent domain. Section 6121.04(J) of the ORC gives OWDA the authority to

> Acquire, in the name of the state, by purchase or otherwise, on such terms and in such manner as it deems proper, or by the exercise of the right of condemnation in the manner provided by Section 6121.18 of the Revised Code, such public and private lands, . . . rights-of-way, property rights, easements, and interests as it deems necessary for carrying out Sections 6121.01 to 6121.22, inclusive, of the Revised Code, but excluding the acquisition by the exercise of the right of condemnation of any wastewater facility or water management facility

> owned by any person or governmental agency, and compensation shall be paid for public of private lands so taken, except that a government-owned wastewater facility may be appropriated in accordance with Section 6121.041 of the Revised Code.

Section 6121.18 authorizes OWDA to appropriate lands for the construction and/or operation of any water development project; it also excepts the power of OWDA to condemn lands utilized by public utilities or common carriers unless provision for the restoration, relocation or duplication of the facilities is made by OWDA at its own expense. Section 6121.19 states the procedures and safeguards which must be followed when OWDA finds it necessary to change the location of any highway, railroad, or public utility. Section 6121.041 deals with OWDA's power to appropriate land when a given area is in noncompliance with an areawide water resources plan; this section will be mentioned in conjunction with an examination of the enforcement powers of OWDA, infra.

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

The OWDA lacks express authorization to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan. In addition, there are no express powers from which this authority may reasonably be implied. The authority to impose a sewer moratorium at the state level has been granted to OEPA (See, OEPA Regulation EP-8 and OEPA Legal Analysis, number 11(a), supra.); thus, the authority of OWDA to refuse additional "hook-ups" to a municipal sewer system would appear to be preempted by OEPA.

11(b) Authority to impose civil or criminal sanctions.

The OWDA has no authority to impose civil or criminal sanction for noncompliance with any aspects of the areawide plan. This authority must be expressly granted by constitution or statute. However, OWDA does have express authority to enforce its rules and regulations by bringing an action in court (Section 6121.04(D)) and through the establishment of a waste treatment facilities service area (Section 6121.041).

12. Authority to require communities and/or industries to participate in the waste treatment system.

The OWDA has no express authority to require communities or private industry to participate in the waste treatment system. However, pursuant to Section 6121.041, OWDA may be requested by the director of OEPA to establish a wastewater facilities service area to include one or more persons or governmental agencies operating a sewage disposal system which are in noncompliance with an order of the director of OEPA. If this is the case, the service area

> may include any contiguous territory not served by wastewater facilities that the authority determines to be desirable to include in the area in order to achieve the most efficient and economical waste disposal and treatment in the area . . .

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

The authority of OWDA to enter and inspect the premises of users of the system and the monitoring of their discharges is not expressed in its enabling legislation. This authority may reasonably be implied, however, from OWDA's authority to "do all acts necessary and proper to carry out the powers expressly granted" (Section 6121.04 (S)) in the situation where OWDA is the owner and operator of a waste treatment facility. Furthermore, when OWDA operates a waste treatment system, it takes on some of the characteristics and gains some of the powers of a public utility, one of which is the right to require users of the improvement to monitor their own emissions or discharges (See, Appendix B: "Public Utilities," Generally).

14. Authority to contract work to other agencies, private corporations, or persons.

Section 6121.04(L) of the ORC empowers OWDA to

> Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6121 of the Revised Code.

Thus, its authority to contract work to other agencies, private corporations, or persons is express. In addition, Section 6121.04(G) empowers OWDA to

> Make available the use or services of any water development project to one or more persons, one or more governmental agencies, or any combination thereof.

15. Authority to employ managers, engineers, etc.

The OWDA has express authority to employ managers, engineers, and other appropriate personnel. Section 6121.04(M) states that OWDA has the authority to

> Employ managers, superintendents, and other employees and retain or contract with consulting engineers, financial consultants, accounting experts, architects, attorneys, and other consultants and independent contractors as are necessary in its judgement to carry out Chapter 6121.

16. Authority to insure facilities and employees.

The OWDA has express authority to insure facilities and employees for fire, liability, wrongful death, etc. This authority is conferred by Sections 6121.04(P) and 6121.04(R).

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

Section 6121.04(I) expressly confers upon OWDA the power to

> Acquire by gift or purchase, and dispose of real and personal property in the exercise of its powers and the performance of its duties under Sections 6121.01 to 6121.22, inclusive, of the ORC.

18. Authority to make, distribute or redistribute loans and grants to other agencies.

The OWDA has the express authority to make loans and grants to other governmental agencies under Section 6121.04(E) for the acquisition and construction of water development projects, and to adopt rules, regulations and procedures for the making of such loans and grants. In addition, OWDA's lending authority for construction of wastewater facilities has been greatly expanded by Section 6121.44. This section authorizes OWDA to make loans to individuals and private corporations for the above purpose.

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

The OWDA has the express authority to enter into all contracts and agreements necessary or incidental to the performance of its duties (Section 6121.04(L)). For any contract in excess of $2,000, the OWDA must accept the lowest bidder, publish notice soliciting bids, enter into a written contract, and require a surety bond of the contractor for 50 percent of contract price, while retaining the authority to reject any and all bids

(Section 6121.04(L) (1) - (4)). The OWDA is expressly authorized to contract with persons, or one or more governmental agencies desiring its services, fixing the terms, conditions, rentals or charges deemed appropriate. The rental or charges agreed to are not subject to regulation or supervision by any other state agency. Moreover, the OWDA is explicitly allowed to acquire, by contract, all or part of any water development project (subject to pre-existing conditions imposed on bond issues). Conversely, any government agency having the power to construct and operate water management facilities may contract with OWDA for provision of its services (Section 6121.13). (See also, Appendix C: "Geographical Jurisdiction and Intergovernmental Relations")

20. Authority to reassign the unused right of any industries to discharge into the system.

The OWDA lacks the express authority to reassign the unused right of any industries to discharge into the waste treatment system. Pursuant to its authority to make available services (Section 6121.03(G)) and to enter into contracts and agreements (Section 6121.03 (L)), it can be reasonably implied that OWDA has the power to reassign this unused right (and concomitant obligation to repay the share of "industrial cost recovery") when bilaterally agreed upon by OWDA and the industry possessing such right. The Ohio law of contracts would govern. Absent an express "transferability provision," however, OWDA could not unilaterally reassign an unused right to discharge into its system.

21. Authority to invest elsewhere monies raised in excess of current expenditures.

Except as otherwise provided in a resolution ordering the issuance of revenue bonds, Section 6121.12 authorizes OWDA to invest revenues in excess of current needs in various agencies of the federal government and the government of the State of Ohio.

22. Authority to contract for private financing.

The OWDA has no authority to contract for private financing.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

The OWDA has no express or implied authority to engaged in planning.

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

Chapter 6123 confers upon OWDA many powers of solid waste management. Section 6123.03 declares it to be the policy of the State to provide for "the conservation of land, air, and water (emphasis added) resources of the State through efficient and proper methods of disposal, salvage and reuse of solid wastes." In furtherance of the policy

> the Ohio water development authority may initiate, acquire, construct, maintain, repair and operate solid waste projects or cause the same to be operated pursuant to a lease, sublease, or agreement with any person or governmental agency; may make loans and grants to governmental agencies for the acquisition or construction of solid waste facilities by such governmental agencies; and may issue solid waste revenue bonds of this state payable solely from revenues, to pay the cost of such projects. Any solid waste project shall be determined by the authority to be in compliance with Chapter 3734 of the Revised Code and with the regulations adopted by the public health council under Section 3734.02 of the Revised Code. Any resolution of the authority providing for acquiring or constructing such projects or for making a loan or grant for such projects shall include a finding by the authority that such

> determination has been made.

The Public Health Council, a branch of the State Department of Health, is created by Section 3701.33. Its rules and regulations, adopted pursuant to Section 3734.02 shall have

> uniform application throughout the state governing solid waste disposal sites and facilities and the inspections and issuance of licenses for all solid waste disposal sites and facilities, in order to assure that such sites and facilities will be located, maintained, and operated in a sanitary manner so as not to create a nuisance, cause or contribute to water pollution, or create a health hazard (Section 3734.02(A)).

Furthermore

> No person shall establish a solid waste disposal site or facility after the effective date of the regulations adopted by the public health council under Section 3734.02 of the Revised Code without first submitting to and having approved by the director detailed plans of the site, facility, and method of operation (Section 3734.02(C)).

"Person" means the state, any political subdivision, public or private corporation, individual, partnership, or other entity (Section 3734.01(G)). The regulations of the Public Health Council are subject to the procedural guarantees of the Ohio Administrative Procedure Act, Sections 119.01 to 119.13, inclusive (See, OEPA analysis, number 25.).

In addition, OWDA is authorized to

> (a)cquire, construct, . . . maintain, . . . operate, lease or rent to, or contract for operation by, a person or governmental agency, solid waste projects, and establish rules and

> regulations for the use of such projects (Section 6123.04(D)).

and

> Engage in research and development with regard to solid waste facilities (Section 6123.04(L)).

Other powers of OWDA contained in Chapter 6123 parallel those powers of OWDA conferred by Chapter 6121 (Water Quality Control).

25. Requirements to consider public input before adopting plans, rules and regulations.

The OWDA consists of seven members: five are appointed by the governor with the advice and consent of the Senate and of which no more than three of whom shall be members of the same political party; the director of natural resources and the director of environmental protection are ex-officio members. Terms are staggered for eight years. Thus, there is an indirect accountability to the electorate as the person responsible for appointment of OWDA members is an elected official.

Section 6121.21 relates to public participation,

> all meetings of (OWDA) shall be public and the records of the authority shall be open to public inspection at all reasonable times, except as otherwise provided in this section. All final actions of (OWDA) shall be journalized and such journal shall be open to the inspection of the public at all reasonable times . . .

Ohio Department of Natural Resources

The Ohio Department of Natural Resources (hereinafter, ODNR) was created in 1949 as part of a comprehensive plan to correlate and coordinate the state's conservation activities (123 O.L. 84; See also, 1950 OAG 582). ODNR is headed by a director whose function is to correlate and coordinate the activities of the various departments of ODNR and to eliminate unnecessary duplications of effort and overlapping of functions (Section 1501.01). The enabling legislation of ODNR is Chapter 1501 of the ORC.

A. Required Authority

1. Authority to construct and operate a waste treatment works.

The authority of ODNR to construct and maintain a sewage or waste treatment works may be implied by Section 1501.21 which states in part

> The director may acquire, construct, reconstruct, improve, equip, maintain, operate, and dispose of water management improvements.

In addition, sewage and waste disposal facilities are referred to later in Section 1501.21; thus, it is assumed that "water management improvements" include the same.

Note: While a fairly strong argument can be made that ODNR is authorized to own and operate waste treatment facilities, it must be kept in mind that its authority to operate such facilities is far weaker than that of the other operational agencies in the analysis. This authority, which forms the basis for many of the other powers, is express for these other political subdivisions; it is implied, if existing at all, for ODNR. While a discussion of other powers rests on the assumption that ODNR possesses the power to own and operate waste treatment facilities, this assumption may be incorrect.

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2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

The authority to accept money from any source, including federal grants, is expressly conferred by Sections 1501.01 and 1501.21. Water management functions are contemplated by Section 1501.21, while a coordinating role in the abatement of nonpoint sources of pollution is embodied in Section 1501.20.

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

The director of ODNR has the express authority, under Section 1501.21 to

> . . . fix, alter, change, and collect rates, fees, rentals, and other charges to be paid by the governmental agencies and persons who are . . . provided with sewerage, sewage, or waste disposal services by facilities constructed or operated by the department of natural resources in order to amortize and defray the cost of construction, maintenance and operation of such facilities.

While "user charges" are not explicitly authorized, the power of ODNR to levy them should be implied by this clause. Arguably, costs of construction, maintenance and operation are influenced by the type of effluent generated, so that a charge or rate based on the amount of discharge would be within the discretion conferred in the director of fixing the charges. It is important to note, however, that the director of ODNR is only empowered to fix rates on ODNR facilities, so that no pervasive regulatory scheme can be implied from this section.

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

The authority of ODNR to comply with the "industrial cost recovery" requirements of the FWPCAA is uncertain. ODNR has implied authority under Section 1501.21 to charge connection and permit fees but these charges, under Ohio law, are not suitable methods to comply with the requirements (See, Appendix B: "Public Utilities," Industrial Cost Recovery, Connection Fees, Permit Fees). ODNR lacks the authority to levy special assessments; thus, the recovery from industry of the federally-funded portion of construction costs attributed to their use of the waste treatment works cannot be accomplished through this method.

Section 1501.21 empowers ODNR to charge user rates and rentals among other costs, to amortize the cost of construction. If increased construction costs would be attributed to the treatment of toxic industrial wastes, it would probably be reasonable for ODNR to charge industry a higher rate per volume than dischargers of ordinary sewage for the amortization of construction costs. However, when industry is singled out to repay the federally-funded share of construction costs attributed to their use, uniformity of rate requirements might possibly be violated (See, Appendix B: "Public Utilities," Industrial Cost Recovery).

ODNR lacks express authority to enter into contracts for the use of their facilities but this power can be implied from the express authority to furnish sewerage and waste disposal services (Section 1501.21). Consequently, ODNR should have the authority to enter into binding agreements to require industry to pay their share of "industrial cost recovery." However, the effect this requirement would have on industry's decision to treat their own wastes should be considered.

5. Authority to incur short-and long-term indebtedness.

The ODNR has no authority to issue bonds and notes for water pollution control projects in general. Section 1501.12 does authorize ODNR to issue revenue bonds but these must be used solely for the acquisition, construction, or improvement of public service facilities in or incidental to state parks.

6. Authority to charge each participating community its proportionate share of the treatment costs.

The ODNR is expressly authorized to enter into contractual agreements with political subdivisions (Section 1501.02; See also, number 19, infra.) In addition, it may fix rates and rentals for the furnishing of waste disposal services (Section 1501.21). From these two sections, it can be concluded that ODNR has the authority to charge communities their proportionate share of the cost of treatment.

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

The ODNR does not appear to have any basis for authority to refuse wastes from a municipality whose noncompliance with the areawide plan is unrelated to the use of the treatment works. Where the municipality's noncompliance is related to the use of the treatment works, it is uncertain whether ODNR possesses the power to refuse its wastes.

8. Authority to accept industrial wastes for treatment, and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

The authority to accept for treatment industrial wastes can be implied from ODNR's power to construct and operate waste disposal services (Section 1501.21). If an industry is in violation of effluent or pretreatment standards, either state or federal, the authority of ODNR to refuse the wastes might possibly be implied from its operation of a waste treatment facility (See, Appendix B: "Public Utilities," Generally). However, where the violation of the areawide plan is unrelated to the use of the treatment works, ODNR would lack the authority to refuse the industrial discharges.

9. Authority to impose land use controls.

The ODNR has no authority to develop and impose land use controls.

10. Authority to acquire land through condemnation and eminent domain.

When authorized by the governor of Ohio to do so, the director of ODNR may acquire property by condemnation and eminent domain for the uses and purposes set forth in its enabling legislation (Section 1501.01).

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

The ODNR appears to lack the necessary regulatory mechanism to prohibit municipalities which are in noncompliance with the areawide plan from making new connections to their facilities. Where the violation is unrelated to the use of the treatment works, the authority seems to be lacking. When the new connections would result in overloading of the municipal facility, the authority to prohibit new connections might possibly be derived from an implied power to protect its improvements; but this power should be considered tenuous at best and legislation would be needed in this area. In addition, the power to impose sewer connection bans has been delegated by the state to OEPA.

11(b) Authority to impose civil or criminal sanctions.

The ODNR has no express power to impose civil or criminal sanctions for violations of the areawide plan. However, the authority to levy a surcharge related to increased treatment costs stemming from a violation of pretreatment standards could be reasonably implied from ODNR's power to charge rates, fees, and rentals (Section 1501.21). Added charges due to increased costs, however, should not be viewed as a penalty or sanction. ODNR has no express authority to sue or be sued.

12. Authority to require communities and/or industries to participate in the waste treatment system.

The ODNR has no authority to require political subdivisions or private industry to participate in the areawide waste treatment system.

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

Under the present state of the law, the authority of ODNR to require a user of the waste treatment system to monitor its discharges can be implied from its ability to operate the system (See Appendix B: "Public Utilities," Generally). However, its authority to enter and inspect the premises of the system's users is uncertain.

14. Authority to contract work to other agencies, private corporations, or persons.

The authority to contract work to other agencies, private corporations and persons is necessarily implied from the power to construct water management improvements (Section 1521.21).

15. Authority to employ managers, engineers, etc.

The authority to employ managers, engineers, etc., is a power which is inherent in the operation of water management improvements (See, Appendix A: "Express and Implied Powers").

16. Authority to insure facilities and employees.

The authority to insure facilities and employees is a power which is inherent in the ownership of facilities and the employment of persons (See, Appendix A: "Express and Implied Powers").

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

The authority to acquire real or personal property, by bequest or purchase, is expressly conferred by Section 1501.01.

18. Authority to make, distribute or redistribute loans and grants to other agencies.

The administration of grants from the federal government and other sources is expressly conferred by Section 1501.21 which states in part:

> The director of natural resources may make loans and grants to governmental agencies for water management and may administer grants from the federal government and from other sources, public or private, for carrying out water management functions, and for the performance of any acts which may be required by the United States or by any agency or department thereof as a condition for the participation by any governmental agency in any federal financial or technical assistance program.

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

The authority to enter into contracts with political subdivisions is expressly conferred by Section 1501.02 which states:

> The director of natural resources may enter into cooperative or contractual arrangements with the United States or any agency or department thereof, other states, other departments and subdivisions of this state, or any other person or body politic, for the accomplishment of the purposes for which the department of natural resources was created. The director shall cooperate with, and not infringe upon the rights of, other state departments, divisions, boards, commissions, and agencies, political subdivisions, and other public officials and public and private agencies in the conduct of conservation plans and other matters in which the interests of the department of natural resources and such other departments and agencies overlap.
>
> The director may, by mutual agreement, utilize the facilities and staffs of state-supported educational institutions in order to promote the conservation and development of the natural resources of the state.

20. Authority to reassign the unused right of any industries to discharge into the system.

    The ODNR has no express authority to reassign any unused right of industry to discharge into the system. However, there should be no problem with a bilateral modification of the agreement to discharge into the system and the concomitant change in "industrial cost recovery" payment. Under its present authority, ODNR would have no right to discharge if the industry chose to retain such right and pay its "industrial cost recovery obligations."

21. Authority to invest elsewhere monies raised in excess of current expenditures.

    The ODNR has no authority to invest elsewhere monies raised in excess of current expenditures.

22. Authority to contract for private financing.

The ODNR has no authority to contract for private financing.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

Section 1501.20 expressly authorizes ODNR to assume a statewide coordinative role with state and local governmental agencies to control nonpoint sources of pollution. The section states:

> The Ohio Soil and Water Conservation Commission shall recommend to the director of natural resources a procedure for coordination of a program of agricultural pollution abatement and urban sedimentary pollution control. Implementation of such a program shall be based on the standards for air and water quality determined by the director of environmental protection. The director of natural resources shall, through the division of soil and water districts, coordinate efforts of state and local governmental agencies to meet the minimum state air and water quality standards relating to agricultural pollutants and urban sedimentary pollutants. The director of environmental protection shall utilize the department of natural resources, the division of soil and water districts and water conservation districts in encouraging landowner abatement of agricultural pollution and urban sediment pollution.

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal

The ODNR has no authority to engage in residual waste management or solid waste disposal.

25. Requirements to consider public input before adopting plans, rules and regulations.

There are no statutory requirements for ODNR to adopt any public participation formats. To extent that ODNR might serve as a wastewater management agency, however, there are no legal barriers to their adopting the procedures listed in Appendix D.

Conservancy Districts

Section 6101.04 of the ORC authorizes the organization of a Conservancy District (hereinafter, CD) for any one or more of the following purposes:

(A) Preventing floods;

(B) Regulating stream channels by changing, widening and deepening the same;

(C) Reclaiming or filling wet and overflowed lands;

(D) Providing for irrigation where it may be needed;

(E) Regulating the flow of stream and conserving the waters thereof;

(F) Diverting or in whole or in part eliminating watercourses;

(G) Providing a water supply for domestic, industrial, and public use;

(H) Providing for the collection and disposal of sewage and other liquid wastes produced within the district;

(I) Arresting erosion along the Ohio shoreline of Lake Erie.

Section 6101.15(N) empowers the Conservancy District to "do all things necessary or incident to the fulfillment of the purposes for which the district is established." Section 6101.80 of the ORC mandates that "Sections 6101.01 to 6101.84, inclusive, of the Revised Code shall be liberally construed (emphasis added) to effect the control, conservation, and drainage of the waters of this state." These three sections, read together, will form the basis for implying the authority for Conservancy Districts to perform acts which are not expressly authorized in Chapter 6101 of the ORC. In other words, CDs should be able to exercise powers through reasonable implication rather than necessary implication (See, Appendix B: "Express and Implied Powers"). However, the Ohio General Assembly has expressly granted Conservancy Districts many powers for which it will be unnecessary to imply the authority from other sections of the Conservancy District Act.

A. Required Authority

1. Authority to construct and operate a waste treatment works.

Section 6101.15(C) expressly empowers Conservancy Districts to

> Construct, acquire, operate and maintain . . . treatment and disposal works, pumping stations and siphons, and any other works and improvements deemed necessary (emphasis added) to accomplish the purposes of the district . . .

Thus, by necessary implication, CDs have the authority to expend money for the construction and/or management of sewage and waste treatment works.

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

There is no express authority for CDs to accept or receive monies from any source, or the federal government in particular, for the construction of facilities but this authority may be implied from the "necessary and "incident" clause of Section 6101.15(N) and Section 6101.23 which states that

> the board of directors of a conservancy district may enter into contracts or other arrangements with the United States government or any department thereof, with persons, railroads, or other corporations, with public corporations, and with the state government of this or other states, with drainage, conservation, conservancy, sewer, park or other improvement districts, in this or other states for cooperation or assistance (emphasis added) . . . in constructing, maintaining, using and operating the works of the district . . .

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

The authority of a waste treatment works management agency to assess users on the basis of cost of treatment, which in turn was determined by the character of the effluent and the distance from the treatment works, is examined in Appendix B: "Public Utilities," Rates and Charges. It was determined that absent contrary statutory or constitutional provisions, a public utility had the authority to assess users on this basis. This position is strengthened in view of the liberal construction given to the grant of powers to CDs by the Ohio General Assembly. In addition, Section 6101.24 of the ORC authorizes CDs to

> make regulations for the determination and measurement of the increased, better, or more convenient use of, or benefit from, the water supply of the district, for determining rates of compensation . . . (emphasis added)

and

> the compensation for . . . benefit from waters of the district may be made by payment according to . . . any other reasonable measurement of value received (emphasis added) by reason of the greater, better, or more convenient use of, or benefit from, the waters of the district.

It appears that this section authorizes assessment of users on the basis of cost of treatment.

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

The authority of CDs to enter into contracts with private industry for "industrial cost recovery" is not expressed in Chapter 6101. However, authority to enter into contracts with private industry might be authorized by Section 6101.23 which empowers CDs to enter into

> contracts or other arrangements with . . . other corporations (which are distinct from public corporations) in constructing, maintaining, using and operating the works of the district . . .

Also, the power to contract should be implied from the "elastic clause" of Section 6101.15(N). However the authority to recover from private industry their portion of the federally-funded share of construction costs is more problematical (See, Appendix B: "Public Utilities," Industrial Cost Recovery).

There is no express authority for CDs to collect permit, license, or collection fees from industrial users. Such authority might be derived from the "elastic clause" of Section 6101.15(N). The amortization of construction costs through these fees is discussed in Appendix B and applies to all government agencies which have the power to charge these fees and this includes CDs.

Another means of achieving "industrial cost recovery" is through special assessments. Unlike other powers, special assessments are among those powers which must be expressly granted, as noted in the section on special assessments in Appendix B. Chapter 6101 empowers CDs to levy special assessments for four purposes: for the "preliminary fund" (Section 6101.44(A), 6101.45); for the "improvement fund" under Section 6101.44(B); for the "bond retirement fund" under Section 6101.44(C) and 6101.48; and for the "maintenance fund" under Sections 6101.44(D) and 6101.53. Contrary to the liberal interpretation given to the general powers conferred upon CDs, powers granted relating to special assessments must be strictly construed.[1]

The "improvement fund" appears to be one channel through which CDs may be able to comply with the requirement of "industrial cost recovery" mandated in the FWPCAA. Section 6101.44(B) states that this fund consists of

> the proceeds of all special assessments the collection of which has not been anticipated in the issuance of bonds or notes . . . which shall be used for defraying expenditures incurred in . . . the acquisition or construction of properties, works, and improvements of the district including . . . the entire cost of construction . . .

An Ohio court has held that the cost of improvements made by a CD was intended by the legislature to be defrayed by assessments.[2] And although the imposition of special assessment of CDs is based upon the taxing power,[3] the Ohio General Assembly has made clear that the apportionment of assessments by CDs must be based upon the benefits conferred to property owners.[4] Thus, although CDs are expressly empowered to levy special assessments to amortize construction costs, the problems noted in Appendix B remain; the utilization of special assessments to defray construction costs for waste treatment works; the exemption of nonindustrial users from special assessments, etc.

In view of the fact that CDs have the authority to issue revenue bonds (Section 6101.401), one method they have to amortize the cost of construction is through "user charges." However, if only industry is charged for the federally-funded share of construction costs (while other users must pay only for the locally-funded share), industry will be assessed at a higher rate than residential and governmental users. However, there may be legal difficulties with charging industries higher rates which are not based on a differential in treatment costs, distance from treatment works, peak hour demand, etc. (See, Appendix B: "Public Utilities," "Industrial Cost Recovery).

5. Authority to incur short-and long-term indebtedness.

The Ohio General Assembly has authorized CDs to issue several types of bonds and notes for the purpose of financing projects and improvements.

CDs have no express authority to issue general obligation bonds. This authority must be express; it cannot be implied.

CDs have express authority to issue revenue bonds

> for the purpose of paying all or part of the cost of acquiring or constructing any improvement which the district or subdistrict is authorized to acquire or construct . . . (Section 6101.501).

CDs are expressly authorized to issue bonds in anticipation of the collection of assessments (anticipatory bonds) through Section 6101.50. They may yield eight percent payable semi-annually and must mature within 30 years in an amount not to exceed 90 percent of the total amount of the unpaid portion of an assessment exclusive of interest levied under Sections 6101.01 - .084. In anticipation of the issuance of such bonds, the district may sell notes to mature within a maximum of five years at eight percent.

CDs, in addition to their bonding authority, have express authority to issue two types of notes. Under Section 6101.46, CDs may issue notes to finance preliminary work, issued at eight percent to mature in two years (renewable) and cannot exceed 75 percent of the proceeds derived or derivable from preliminary assessments. And, pursuant to Section 6101.56, CDs have the express power to issue short-term, six-month notes, called anticipatory notes, to be issued at eight percent. They are to be issued in anticipation of the collection of assessments and shall not exceed 50 percent of the total anticipated amount. Funds obtained from the issuance of said notes may be only used for those purposes for which the anticipated assessment is intended.

6. Authority to charge each participating community its proportionate share of the treatment costs.

Section 6101.24 empowers CDs to determine rates and an operator of a public utility has the power to base "user charges" on the cost of treatment. On this basis, it can be concluded that CDs have the authority to charge communities their proportion of user costs including the cost related to the distance from the treatment works (See, Appendix B: "Public Utilities," Rates and Charges). In addition, CDs are authorized to enter into contracts and agreements with other governmental agencies for the operation of their works and improvements (Section 6101.23). Consequently, this section would give CDs the authority to enter into agreements with participating communities to pay their proportionate share of treatment costs.

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

The authority of CDs to refuse wastes from municipalities which fail to comply with the use of the treatment system is necessarily implied from the authority to make and enforce rules

> (t)o prohibit or regulate the discharge into the sewers of the district any liquid or solid wastes deemed detrimental to the works and improvements of the district (Section 6101.19(A)(5));

and

> (t)o protect and preserve the works, improvements, and properties owned or controlled by the district, prescribe the manner or their use by public corporations and persons . . . (Section 6101.19(A)(1)) (See also, Appendix B: "Public Utilities," Duty to Serve).

There is no statutory or case authority, however, for a CD to refuse the wastes of a municipality when the noncompliance is unrelated to the use of the system. Legislative action in this area is needed. However, a statute conferring this power would be very strictly construed, being in derogation of the common law. For a discussion of this topic, *see*, Appendix B: "Public Utilities," Duty to Servce.

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

   The authority of CDs to accept for treatment industrial wastes is authorized by Section 6101.15(F) which states that the board of directors of a CD may

   > (c)onstruct connections to the works of the district . . . for the delivery of sewage and other liquid wastes thereto.

   The authority of CDs to refuse industrial wastes when pretreatment standards are not met can be implied by Section 6101.19(C). However, the authority of CDs to refuse to treat industrial wastes when the noncompliance with the areawide plan is unrelated to the use of the treatment system is uncertain (*See*, Appendix B: "Public Utilities," Duty to Serve).

9. Authority to impose land use controls.

   The CDs have very limited power to develop and impose land use regulations pursuant to Section 6101.19. CDs have no power to impose zoning or subdivision regulations; these powers are derived from the police power of governments and must be expressly granted. However, CDs appear to have the power to impose certain other land use controls such as the issuance of discharge permits (Section 6101.19(A)(5)); and the imposition and control of construction permits, development permits, hillside development regulations and grading regulations where related to works and improvements of CDs. Section 6101.19 also authorizes CDs to develop public works policies and conservation policies.

10. Authority to acquire land through condemnation and eminent domain.

The CDs have been delegated the express power of eminent domain from the state. Section 6101.18 authorizes CD's to condemn private property for the use of the district. Although this right is expressed in Section 6101.17 as being dominant over the right of eminent domain of railroad, telegraph, telephone, gas, water, power and other companies and corporations, and over townships, counties and municipal corporations; subsequent Ohio statutes have made uniform all eminent domain provisions.

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

There is no express authority for CDs to refuse additional hook-ups from any or all users in a municipality which does not comply with the areawide plan. This power might possibly be implied, under the authority of Section 6101.19 and the "elastic clause" of Section 6101.15(N). However, an applicant's eligibility for waste treatment service will probably have to be judged by its own compliance with the areawide plan and rules and regulations of the management agency rather than refusing service on the grounds that it is located in a political subdivision which is in violation of the plan. Statutory authority is needed in this area (See Appendix B: "Public Utilities," Duty to Serve). Furthermore, CDs appear to lack the authority to impose a local sewer moratorium.

CDs, however, can probably prohibit a municipality which is in violation with the areawide plan, from accepting additional users for their sewage treatment plants, the key question being whether the non-compliance is related to the use of the regional waste treatment system.

11(b) Authority to impose civil or criminal sanctions.

The CDs have express authority under Section 6101.77 to enforce their rules and regulations by instituting proceedings in court against any persons or public corporations which violate any order of the board of directors. Section 6101.99 establishes penalties for violation of specific sections of the ORC. Section 6101.99(B) empowers CDs to fine anyone who violates Section 6101.19, which is the rule-making power, a maximum of $1,000. No other criminal or civil sanctions are authorized under the former section. However, Section 6101.19 empowers CDs to enforce all necessary regulations made by it through mandamus proceedings.

12. Authority to require communities and/or industries to participate in the waste treatment system.

The CDs have no authority, express or implied, to require communities to participate in the system of waste treatment.

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

The authority of CDs to inspect and monitor public sewage treatment works and private industries is implicit in Section 6101.19 of the ORC. This section authorizes CDs to make and enforce such rules and regulations as it deems necessary and advisable: (1) to protect and preserve the works, improvements, and properties owned or controlled by the district and prescribe their manner and use by public corporations and persons; and (2) to prohibit and regulate the discharge into the sewers of the district of any liquid or solid wastes deemed detrimental to the works and improvements of the district. The authority to inspect and monitor may be reasonably implied from this section and such authority is not contrary to other statutes of the Ohio Constitution. Furthermore, an agency which operates a public utility has the authority to require users of the facility to monitor, at their own expense, their use of the facility (See, Appendix B: "Public Utilities," Generally). In addition, Section 6101.14(A) authorizes CDs to enter lands within or without the district to make examinations and "have access to the work." This section is ambiguous, however, as it is unclear whether work refers to preliminary works or to currently operating improvements such as a waste treatment plant.

14. Authority to contract work to other agencies, private corporations, or persons.

    The authority of CDs to contract work to other agencies, private corporations or persons is necessarily implied by Section 6101.16 which establishes procedures for the awarding of contracts in excess of $1,000.

15. Authority to employ managers, engineers, etc.

    Pursuant to Section 6101.12, CDs have the express authority to employ managers, engineers, etc.

16. Authority to insure facilities and employees.

    The authority of CDs to insure facilities and employees is expressly granted by Section 6101.15(M) of the ORC.

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

    Section 6101.15(K) grants to CDs all powers to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property for any necessary purpose of the district or for "storing material to be used in constructing and maintaining said works and improvements."

18. Authority to make, distribute or redistribute loans and grants to other agencies.

CDs do not have express authority to make loans and grants to other agencies and such power should not be implied as "necessary and incident to the fulfillment of the purposes for which the district is established."

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

The authority to enter into contracts with state and/or federal government is expressly authorized by the above section, 6101.23 (*See,* Appendix C: "Geographical Jurisdiction and Intergovernmental Relations," Conservancy Districts).

20. Authority to reassign the unused right of any industries to discharge into the system.

The CDs have no express power to reassign the unused right of any industries to discharge into the system. It can reasonably be implied, however, that CDs would have the power to reassign this right (and concomitant obligation to repay the share of "industrial cost recovery") when bilaterally agreed upon by the CD and the industry possessing such right. The Ohio law of contracts would govern. Absent an express "transferability provision," however, CDs could no unilaterally reassign an unused right to discharge into its waste treatment system.

21. Authority to invest elsewhere monies raised in excess of current expenditures.

The CDs do not have express authority to invest elsewhere monies raised in excess of expenditures. Furthermore, this power cannot be reasonably implied from other express powers. Section 6101.44 states the four funds through which the monies of CDs may be administered. By the doctrine of *expressio unius est exclusio alterius,*[5] it would seem that CDs are prohibited from investing their monies elsewhere. However, the OAG has authorized CDs to invest surplus funds in the bonds issued by the CD, paying the fair market value therefore.[6]

22. Authority to contract for private financing.

The CDs are not authorized to contract for private financing.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

The CDs are authorized to prepare an official plan for the improvement of the CD under Section 6101.13.

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

The CDs have no express powers to engage in residual waste management or solid waste disposal. For a discussion of the role which the Miami Conservancy District takes in this area, see the report, A Review of Regional Agencies Impacting Regional Water Quality Management.

25. Requirements to consider public input before adopting plans, rules and regulations.

The members of the board of directors of CDs are not elected officials but are appointed by the Court of Common Pleas (Section 6101.10). The same is true of the board of appraisers (Section 6101.27). Being appointed by the judicial branch, they are not subject, directly or indirectly, to the electoral process. Board members, however, must be freeholders of the district (Section 6101.10). Appraisers are required to be freeholders of the State (Section 6101.27).

There are no statutory public participation or hearing requirements pursuant to CDs' rule-making powers (Section 6101.19). Presumably, CDs' procedures are not governed by Chapter 119 of the ORC. While Section 6101.33 provides for a hearing on appraisals, if required by a property owner, and Section 6101.74 provides for a damage remedy by persons or public corporations injured by an act of an agent of a CD, neither section relates to public responsiveness in the initial decision-making process. This should in no way imply that CDs are not responsive to public opinion or that they do not make provisions for public participation. Although not required by the ORC, there are no legal barriers for the CDs to comply with the public participation requirements listed in Appendix D.

FOOTNOTES

1. See, Muskingum Watershed Conservancy District v. Seibert, 57 O. App. 413, 14 NE 2d 425.

2. Miami County v. Dayton, 92 OS 215, 110 NE 726.

3. See, Brady v. Miami Conservancy District, 110 O. App. 240, 30 OCA 17.

4. See, ORC Secs. 6101.13, 6101.27, 6101.28; Case notes to Sec. 6101.28, nos. 2, 4; Conservancy District v. Ryan, 104 OS 79, 135 NE 282.

5. "That which is not expressly stated is excluded."

6. 1934 OAG Number 2854.

Sanitary Districts

The enabling legislation for Sanitary Districts, (hereinafter, SD) Chapter 6115 of the ORC, does not include an "elastic clause" which confers upon the district all powers which are necessary and incidental to the carrying out of the purposes of the enabling legislation. Nor does it contain a section which states that the chapter and the powers of the district shall be liberally construed.

This is an analysis of the authority of Sanitary Districts to carry out the critical factors required for implementation of Section 208(c)(2) of the FWPCAA.

A. Required Authority

1. Authority to construct and operate a waste treatment works.

   The SD has the express authority to

   > Construct, preserve, operate and maintain, in and out of said district, . . . treatment and disposal works, . . . and any other works and improvements deemed necessary to accomplish the purposes of the district (Section 6115.18(C)).

   However, this section specifically prohibits SDs from constructing and operating sewerage systems, distribution systems or other related improvements locally (emphasis added) serving the political subdivisions forming the district. These services are to be provided by the public corporations (*See also*, Section 6115.18(D)).

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

   The SDs have express authority to accept monies from any source, including federal grants, within the limitations of Section 6115.27 which states in part:

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> The board of directors of a sanitary district may enter into contracts or other arrangements with the United States government or any department thereof, with persons, railroads, or other corporations, and with the state government of this or other states, with sewerage, drainage, conservation, conservancy, or other improvement districts, in this or other states, for cooperation or *assistance* (emphasis added) in constructing, maintaining, using and operating the works of the district or the waters thereof . . .

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

   The SDs have no express authority to charge users for the service of waste treatment which they provide. However, this authority is necessarily implied from the power to operate a waste treatment works in Section 6115.18(C), *supra*. Since no specific method of charges is mandated by Chapter 6115, SDs should have the authority to charge users on the basis of the cost of treatment (*See*, Appendix B: "Public Utilities," Rates and Charges). Since all public utilities have the power to assess users on the basis of reasonable rates, it must be assumed that Section 6115.53, empowering SDs to pay for the maintenance and operation of treatment and disposal works through the levy of an annual maintenance assessment, is not meant to be an exclusive means of raising revenue.

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

   As seen in the analyses for other agencies, the authority to comply with the "industrial cost recovery" requirement of the FWPCAA is a potential problem area. SDs have the authority to pay for the construction of waste treatment facilities from the rates and rentals collected from the users of their improvements. These "user charges" may be partially used to retire the debt created by the issue of revenue bonds which, in turn, had been issued to defray the costs of construction (See, Appendix B: "Public Utilities," Industrial Cost Recovery).

Section 6115.23 expressly authorizes SDs to make and enforce rules and regulations for the use of their improvements. It can be implied from this power that SDs have the authority to control the flow of wastes into their system by such methods as the issuance of permits and the levying of connection or "tap-in" charges. Because of limitations, however, on what may be legally included in these charges, there may be no suitable methods for meeting the "industrial cost recovery" requirements of the FWPCAA (See, Appendix B: "Public Utilities," Industrial Cost Recovery).

SDs have the express authority to levy special assessments, pursuant to Section 6115.48, upon properties specially benefited by their improvements. The amount of this assessment must be based upon and not greater than the benefits conferred on the property by the improvements. Since the amount of the benefits conferred will not necessarily be equal to the cost of construction which is proportionate to an industry's use of the facilities, the use of special assessments is less than an ideal method for complying with the "industrial cost recovery" requirements of the FWPCAA (See,Appendix B, "Public Utilities," Rates and Charges - Special Assessments).

SDs may be able to satisfy the "industrial cost recovery" requirements through the imposition of a "user charge" system. The authority of SDs to charge rates and rentals is not expressed in the enabling legislation, but can be necessarily implied from the authority of SDs to own and operate waste treatment facilities. Furthermore, SDs have the authority to amortize capital costs through the collection of rates and rentals since they have the authority to issue revenue bonds to finance the cost of construction (See, number 5, infra.). If industry alone, however, is to be assessed for the federally-funded share of construction costs, it will be charged higher rates for an equivalent quality and quantity of service than a nonindustrial user will be charged. In Appendix B, it is stated that a waste treatment agency may charge some users a higher rate than others when such differentials are based on the cost of treatment, cost of collection, peak hour demand, etc. The problem, if there be one, is that the higher rates charged to industry would, in part, be based on the "industrial cost recovery" requirements of the FWPCAA which is unrelated to the cost of treating the industrial wastes. Until charging such rate differentials is expressly authorized by statute or upheld in the Ohio courts, the authority of SDs to accomplish "industrial cost recovery" through user charges will remain uncertain.

A final method for SDs to comply with the "industrial cost recovery" requirements is for them to enter into binding agreements with industry where the latter agrees to repay the federally-funded share of construction costs attributable to its use of the facilities. However, the effect that the contract requirement would have on industries withdrawing or not participating in the regional system cannot be overlooked.

5. Authority to incur short-and long-term indebtedness.

SDs have no authority to issue general obligation bonds.

The costs of constructing or superintendency of SD improvements may not be financed by the issuance of revenue bonds. These costs can only be recovered out of the "bond fund" consisting of the proceeds from the levies against special assessments of property benefited. 1964 OAG Number 1579. (See also, Section 6115.45(B)).

SDs have express authority to issue bonds in the anticipation of the collection of special assessments (Section 6115.50). The bonds are not to exceed 90 percent of the total amount of assessments levied under this chapter, and are payable semi-annually maturing at annual intervals within thirty years commencing not later than five years, at a rate not to exceed eight percent. They are payable out of money derived from the "bond fund" consisting of the proceeds of levies made against the special assessment of benefits (Section 6115.45(B); Section 6115.48).

SDs have no authority to issue revenue notes or notes in the anticipation of the collection of special assessments.

6. Authority to charge each participating community its proportionate share of the treatment costs.

The authority of SDs to charge reasonable rates and assess users for the use of services is necessarily implied from their express authority to operate a waste treatment works. Since each user may be assessed on the basis of the cost of treatment (See Appendix B: "Public Utilities") if each category in a community is paying its proportionate share, then each community will be paying its proportionate share also. In addition, charges for collecting and treating wastes from a community's sewer system may be based on the cost of treatment and other services which include collection costs based on distance.

Furthermore, Section 6115.27 authorizes SDs to contract with communities in order to reach an agreement for each participating community to pay its proportionate share of treatment costs. It states in part

> The board of directors of a (SD) may enter into contracts or other agreements with . . . public corporations . . . for cooperation or assistance in constructing, maintaining, using, and operating the works of the district . . .

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

The authority of SDs to refuse wastes from municipalities which fail to comply with the use of the treatment system is necessarily implied from the authority to operate the system. This power is also incident to SDs' authority to make and enforce rules and regulations concerning

> (B) . . . the manner in which connections to . . . works of the district shall be made (E) (the) discharge into such sewers of any liquid or solid wastes deemed detrimental to the works and improvements of the district. (Section 6115.23).

These regulations, however, have no effect until they have been approved by OEPA.

There is no statutory or case authority, however, for a SD to refuse the wastes of a municipality when the noncompliance is unrelated to the use of the system. Legislative action in this area is needed. However, a statute granting this power would be very strictly construed, being in derogation of the common law. For a discussion of whether a violation of rules would be related or unrelated, (See, Appendix B: "Public Utilities," Duty to Serve).

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

The power of SDs to accept for treatment industrial wastes is authorized by Section 6115.18(D) which states that the board of directors of a SD may:

> construct connections to the works of the district for the delivery thereto of sewage and other liquid wastes.

The authority of SDs to refuse industrial wastes when they fail to meet pretreatment and effluent standards, whether local, state or federal, is necessarily implied from Section 6115.23 (E) which empowers SDs to prohibit the discharge of any wastes into the system which they deem detrimental to their works. If an industry is in noncompliance with a portion of the areawide plan unrelated to the use of the treatment system, however, it is doubtful that a SD would have the authority to refuse the industrial wastes (See, Appendix B: "Public Utilities," Duty to Serve).

9. Authority to impose land use controls.

The SDs have no authority to impose land use controls.

10. Authority to acquire land through condemnation and eminent domain.

The SDs have express authority to acquire land through condemnation and eminent domain (Section 6115.18(H)). In addition, this right is dominant over the right of certain private and public entities which are listed in Section 6115.21.

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

The SDs probably lack the authority to refuse additional "hook-ups" from a user in a municipality even though the municipality's noncompliance is related to the use of the treatment system. An applicant's eligibility for service will probably have to be judged by its own compliance with a SD's rules and regulations and not by the fact that it is located in a political subdivision which fails to comply (See, Appendix B, "Public Utilities," Duty to Serve). Statutory authority is needed in this area.

However, SDs, under their rule-making power, can probably prevent municipalities which fail to comply with the proper use of the waste treatment system from accepting additional users for their sewer or sewage treatment systems. Again, a key issue may be whether or not the noncompliance is related to the use of the waste treatment system.

11(b) Authority to impose civil or criminal sanctions.

The SDs are expressly authorized pursuant to Section 6115.23 to enforce all of their rules and regulations by mandamus or otherwise in the courts of Ohio. These powers to impose criminal penalties are limited. Section 6115.99(C) authorizes a maximum fine of $500 for any who do damage to the works of a SD.

Section 6115.23 authorizes the board of a SD to recovery by civil action a sum between $500 and $1000 from any person or public corporation which violates any regulations made pursuant to Section 6115.23(A)-(E). Each offense or violation entitles the SD to a separate recovery. In addition, any wrongdoer will be liable for damage caused to the works and improvements of a SD.

Finally, the authority of SDs to levy surcharges for noncompliance which results in an increased cost of treatment is implicit in their power to charge reasonable rates and rentals.

12. Authority to require communities and/or industries to participate in the waste treatment system.

The SDs have express authority to require political subdivisions and private industry to participate in the waste treatment system. Section 6115.18 states in part:

> . . . the board may require use of the improvements of the district by

public corporations and persons included within the district and for which such improvements were installed.

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

    The SDs have no express authority relating to inspection of a user's premises or monitoring of their discharges. However, it is generally accepted that the operator of a waste treatment works can require that users of the facility monitor the extent of their use at their own expense (See, Appendix B: "Public Utilities," Duty to Serve).

    SDs may be able to derive this authority from their rule-making powers in Section 6115.23(A)-(E). Furthermore, Section 6115.17(A) authorizes the board of directors of a SD to enter land for examinations and have access to the work (of the SD). This section is ambiguous, however, as it is unclear whether the word "work" refers to "preliminary purposes" or whether it refers to operational improvements of the SD. Since the authority of SDs is not liberally construed, however, it may be preferable for the Ohio General Assembly to pass enabling legislation giving SDs full and express power to enter, inspect and monitor.

14. Authority to contract work to other agencies, private corporations, or persons.

    The power to contract work of other persons is expressly authorized, subject to the conditions that bid requests must be publicized, the chosen contractor bonded, the contract written with at least a reference to the specifications, signed by the board president and contractor, and executed in duplicate. In an emergency, the advertising may be waived by consent of the board or a judge (Section 6115.20).

15. Authority to employ managers, engineers, etc.

The SDs have the express authority to employ an attorney, a chief engineer, and other engineers and assistants as are needed (Section 6115.14).

16. Authority to insure facilities and employees.

The authority to insure facilities and employees is not express, but this power is necessarily implied by the purposes and express powers of SDs (See, Appendix A: "Express and Implied Powers").

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

The SDs have express authority for all powers necessary and incident to the acquisition, holding and disposal of real and personal property (Section 6115.18(H)).

18. Authority to make, distribute or redistribute loans and grants to other agencies.

The SDs have no express or implied authority to make loans or grants to other agencies.

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

The SDs are expressly authorized by Section 6115.27, supra. to enter into contracts with both the federal and state governments. For a more detailed discussion,(See, Appendix C: "Geographical Jurisdiction and Intergovernmental Relations," Sanitary Districts).

20. Authority to reassign the unused right of any industries to discharge into the system.

The SDs have no express authority to assign the unused right of any industries to discharge into the system. However, Section 6115.27 authorizes SDs to

> enter into contracts or other arrangements with . . . persons, . . . with public corporations . . . for cooperation . . . in . . . using . . . the works of the district . . .

From this section, it can be implied that SDs have the authority to reassign any unused right of industry to discharge into the system (and concomitant obligation of the industry to pay its required share of "industrial cost recovery") pursuant to a bilateral modification of the original agreement by the SD and the industry possessing the right. Ohio contract law would govern. Absent an express "transferability provision," however, an SD would lack the power to unilaterally reassign this unused right.

21. Authority to invest elsewhere monies raised in excess of current expenditures.

The SDs have no authority to invest elsewhere monies raised in excess of current expenditures. They are required to place their monies in one of three separate funds: the "preliminary fund," the "bond fund," and the "maintenance fund" (Section 6115.45 (A) - (C)).

Surplus funds may be used to retire bonds, reduce the assessment rate, or accomplish any legitimate function of the SD (Section 6115.64).

22. Authority to contract for private financing.

The SDs may borrow money at an interest rate not exceeding six percent or issue and sell warrants to finance preliminary work (Section 6115.47). However, they have no authority to contract for financing of capital expenditures or current operating expenses.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

The SDs planning powers are confined to the preparation of a plan for the purposes of which the district was created (Section 6115.16). The official plan of the district must be approved by the director of OEPA and the Court of Common Pleas. OEPA must consider the plan's compliance with air and water quality standards and regulations and solid waste disposal requirements. Also, Section 6115.17 authorizes SDs to enter lands for surveys and examinations in preparation of the plan.

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

The SDs have express authority to engage in residual waste management and solid waste disposal. Section 6115.04(G) states that a SD may be organized for the purpose of collection and disposal of garbage and Section 6115.04(H) states that the district may be organized to "collect and dispose of any other refuse that may become a menace to health."

25. Requirements to consider public input before adopting plans, rules and regulations.

The board of directors of an SD is not subject to the electoral process. The Court of Common Pleas from each county which has land included in a SD will appoint one director from their county. If only one county is included in a SD, the SD will be controlled by the director; with more than one county, the SD will be controlled by a board of directors.

There are express statutory requirements for public participation in the making of a SD's official plan (Section 6115.16) and in its alteration (Section 6115.40). Although there are no legal requirements for public participation, there are no legal barriers for a SD to afford all of the public participation opportunities listed in Appendix D.

Regional Water and Sewer Districts

The statutory authority providing for the organization and powers of Regional Water and Sewer Districts (hereinafter W&S Districts) is Chapter 6119 of the ORC. Such districts are vested with broad powers including an "elastic clause" which authorizes W&S Districts to "do all acts necessary or proper to carry out the powers granted in Chapter 6119 of the Revised Code" (Section 6119.06(AA).

This is an analysis of the authority of Regional Water and Sewer Districts to carry out the critical factors required for implementation of Sections 208 (c) (2) of the FWPCAA.

A. Required Authority

1. Authority to construct and operate a waste treatment works.

   The W&S Districts have the express authority to:

   > (a)cquire, construct, reconstruct,
   > enlarge, improve, furnish, equip,
   > maintain, repair, operate . . .
   > water resource projects within or
   > without the district (Section 6119.06(G)).

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

   Section 6119.06(J) expressly provides that W&S Districts may accept federal and state grants as well as aid or contributions of money, property, or labor.

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

   The W&S Districts have the express authority to charge and collect rentals for the use of the services of any water resource project (Section 6119.06(V)). The rates and rentals are not subject to the approval of the state or any political subdivision thereof. Therefore, W&S Districts have the implied authority to charge users their proportionate share of the cost of operating the waste treatment works because they may reasonably base their charges on the cost of treatment or the quality of the effluent.

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

As noted in the analyses on other agencies, the authority to comply with the "industrial cost recovery" requirement of the FWPCAA is a potential problem area. W&S Districts have the authority to pay for the construction of waste treatment from the charges collected for use of the facilities; these "user charges" go in part to the retirement of revenue bonds which are issued to pay the costs of construction (See, Appendix B: "Public Utilities," Industrial Cost Recovery).

Section 6119.08(D) expressly authorizes W&S Districts to establish rules and regulations as are necessary and advisable to

> prohibit or regulate the discharge into wastewater facilities of the district of any liquid or solid waste detrimental to its works and improvements.

It can be implied from this power that W&S Districts have the authority to control the flow of wastes into their system by such methods as the issuance of permits and the levying of connection or "tap-in" charges. However, because of limitations on what may be legally included in these charges, they are not suitable methods for meeting the "industrial cost recovery" requirements (See, Appendix B: "Public Utilities," Industrial Cost Recovery).

Section 6119.17, which authorizes a special tax levy if approved by the electorate, would not aid in "industrial cost recovery" because the levy is used to amortize a W&S District's bond issue. In other words, the tax levy is authorized to be raised for payment of the cost of construction not attributable to funding by the federal government but paid for by local financing.

W&S Districts are expressly authorized to levy a tax, subject to the ten-mill limitation, for the

> purpose of paying any portion of the cost of one or more water resource projects . . . (Section 6119.18).

However, unlike the tax levy authorized by Section 6119.17, this tax is not exempt from the requirement of uniformity imposed by Article XII, Section 2 of the Ohio Constitution which means that the amount levied must be based on property values. Therefore, this tax would not be a suitable method of meeting the "industrial cost recovery" requirement.

W&S Districts have express authority to levy special assessments on property specially benefited by district improvements (Sections 6119.06(I); 6119.42). Section 6119.42(B) authorizes the districts to determine the amount of the assessment "(i)n proportion to the benefits which result from the project."

However, the "benefits conferred" do not necessarily equal the proportionate cost attributable to the use of the facilities, thus making this method an unsound one for achieving "industrial cost recovery" (See, Appendix B: "Public Utilities," Special Assessments).

W&S Districts may be able to meet the "industrial cost recovery" requirements of the FWPCAA through its "user charges" system. The authority to charge rates and rentals for the use of a waste treatment works is expressed in Section 6119. 06(V). Furthermore, W&S Districts have the authority to amortize capital costs since they may issue revenue bonds to pay for the costs of construction (See, number 5, infra.). However, if industry alone is to be assessed for the federally-funded share of construction costs, it will be charged higher rates for an equivalent quality and quantity of service than a nonindustrial user will be charged. In Appendix B, it is stated that a waste treatment management agency may charge some users higher rates than others when such differentials are based on the cost of treatment, cost of collection, peak hour demand, etc. The problem, if there is one, is that the higher rates charged to industry would, in part, be based on the "industrial cost recovery" requirements of the FWPCAA which is unrelated to the cost of treatment. Until charging such rate differentials is expressly authorized by statute or upheld in the Ohio courts, the authority of W&S Districts to accomplish "industrial cost recovery" through user charges will remain uncertain.

W&S Districts have express power to contract with users for service and to fix the terms and conditions of such service. Section 6119.06(P) empowers the districts to

> enter into contracts with any person or political subdivision to render services to such contracting party for any service the district is authorized to provide.

Section 6119.09 authorizes W&S Districts to enter into contracts for the use of services and fix the terms, conditions, and rentals for the service. These sections would seem to authorize the districts to require industry to enter into a binding agreement to repay the federally-funded share of construction costs attributable to their use of the facilities. However, the effect this condition would have on industries withdrawing or not participating in the regional system cannot be overlooked.

5. Authority to incur short-and long-term indebtedness.

The W&S Districts have no authority to issue general obligation bonds. This authority must be expressly granted and is usually delegated to municipal corporations and counties.

Express authority for the issuance of revenue bonds is provided in Sections 6119.06(J) and 6119.12. These bonds are payable out of the revenues of the district. They bear all the qualities and incidents of negotiable instruments. Such bonds may be issued without limitation and without voter approval. The issuance of revenue bonds is also exempt from the provisions of the Uniform Bond Law (Section 6119.13). W&S Districts also have the authority to issue water resource revenue refunding bonds.

Section 6119.30 expressly authorizes the issuance of bonds in the anticipation of the levy of special assessments (anticipatory bonds).

W&S Districts have express authority to issue notes in the anticipation of the collection of special assessments (anticipatory notes) in Section 6119.30 and the authority to issue notes backed by the revenue raised by the improvements and to issue renewal notes (Section 6119.12).

6. Authority to charge each participating community its proportionate share of the treatment costs.

The W&S Districts have the authority to charge each participating community its proportionate share of the costs of treatment. Section 6119.06(P) empowers W&S Districts to

> (e)nter into contracts with any person or any political subdivision to render services to such contracting party for any service the district is authorized to provide.

Section 6119.09 authorizes W&S Districts to enter into service agreements with political subdivisions for the payment and collection of rentals and other charges in return for the use or services of any water resource project of the Districts. Agreements between W&S Districts and political subdivisions of the State are not subject to supervision by any authority, commission, board, bureau or agency of the State (Section 6119.09).

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

Section 6119.08(A), (D) grants W&S Districts the express power to make rules and regulations to protect and preserve the projects of the district and to prohibit or regulate the discharge into the wastewater facilities. The district also has express authority to close any opening or connection made improperly or in violation of rules and regulations. Thus, the authority of W&S Districts to refuse wastes from a municipality not in compliance with the areawide plan related to the use of the treatment works is necessarily implied. Districts have express authority to refuse municipal wastes for nonpayment of rents and other charges (Section 6119.06(V)). Whether or not W&S Districts have authority to refuse wastes from a municipality for violations of rules and regulations unrelated to the use of the treatment works is uncertain and depends upon the relationship of the acts to the use of the system (*See*, Appendix B: "Public Utilities," Duty to Serve).

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

Pursuant to Section 6119.06(H) which authorizes W&S Districts to

> (m)ake available the use or service of any water resource project to one or more persons, one or more political subdivisions, or any combination thereof.

such districts have the authority to accept industrial wastes for treatment. ("Person" is defined as "any natural person, firm, partnership, association, or corporation other than a political subdivision.") (Section 6119.011(C).

The authority to refuse industrial wastes if pretreatment standards are not met is necessarily implied by Section 6119.08(D) which empowers W&S Districts

> (t)o prohibit or regulate the discharge into the wastewater facilities of the district of any liquid or solid waste detrimental to its works and improvements.

However, when industry's noncompliance is unrelated to the use of the system, the authority to refuse the wastes is tenuous (See, Appendix B: "Public Utilities," Duty to Serve).

9. Authority to impose land use controls.

   A limited number of land use controls can be reasonably implied under the rule-making powers of Section 6119.08(A), (B), and (C). These may include the establishment of conservation easements, development permits for areas adjacent to the water supply, hillside development and grading regulations at these areas, and the issuance of permits for the discharge into facilities they operate.

10. Authority to acquire land through condemnation and eminent domain.

    Extensive power of condemnation and eminent domain, except the right to condemn privately or municipally owned water management facilities, is expressly granted by Section 6119.06(M), (R), (S) and 6119.11.

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

Pursuant to W&S Districts' rule-making powers expressed in Section 6119.08(B) which states that the district may make and enforce such rules and regulations necessary and advisable

> to prescribe the manner in which ditches, sewers, pipelines, and other works shall be adjusted to or connected with the projects of the district and the manner in which waste is disposed of in the district;

and Section 6119.09(C) which authorizes districts to:

> prescribe the permissable uses of the water supply and the manner of its distribution and to prevent the pollution or unnecessary waste of such water supply.

An argument can be made that W&S Districts should have the implied authority to impose a ban on additional sewer "hook-ups" when the additions could cause the system to overload. The same argument could be made if the municipality were in violation of federal or state treatment standards. To do so, however, may possibly mean giving the enabling act for W&S Districts a more liberal construction than the courts would be willing to accept. Moreover, when a municipality's noncompliance is unrelated to the use of the regional waste treatment system, the authority of W&S Districts to impose a ban on "hook-ups" for any or all users located in the municipality is even more tenuous. This is an area where a legislative amendment would be advised.

11(b) Authority to impose civil or criminal sanctions.

Section 6119.06(D) expressly confers upon W&S Districts the power to sue and be sued. Section 6119.08 authorizes the districts to enforce by mandamus, injunction, or other legal remedy (including an action for damages) their rules and regulations. W&S Districts have no authority to impose civil or criminal penalties for violation of their rules and regulations; these sanctions must be expressly delegated by the Ohio General Assembly. The districts, however, do have express authority to impose sanctions for the failure to pay rents and charges for the use of the facilities (Section 6119.09) and for the failure to pay levied assessments (Section 6119.53). Any user which willfully (emphasis added) violates the rules and regulations of W&S Districts shall be liable for damages.

12. Authority to require communities and/or industries to participate in the waste treatment system.

Section 6119.06(Z) expressly authorizes W&S Districts to require industries to participate in the waste treatment system. The section mandates that when the owner (emphasis added) of a premises is accessible to a water resource project , he may be required to connect his premises to the waste treatment system when found necessary by the district for the protection of the health and property in the district and the abatement of pollution. If the term "owner" is construed to include political subdivisions and the term "premises" is construed to include sewerage works or a sewage disposal plant, municipalities could also be required to participate in the system under certain circumstances. This problem is one of statutory construction and not one of implying powers from those expressed.

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

The authority to enter and inspect point sources of pollution which discharge into the system is necessarily implied by Section 6119.08(D) which states that W&S Districts have the authority to make and enforce such rules and regulations which are necessary and advisable to

> prohibit or regulate the discharge into the wastewater facilities of the district of any liquid . . . waste detrimental to its improvement.

In addition, it is a reasonable regulation for an agency which operates a waste treatment works to require users of the system to monitor their use of the system (See, Appendix B: "Public Utilities," Generally).

14. Authority to contract work to other agencies, private corporations, or persons.

The W&S Districts are expressly authorized to contract work to other persons or political subdivisions (Section 6119.06 (O)). Additionally, Section 6119.10 states that the

> board of trustees of a regional water and sewer district . . . may make any contract for the purchase of supplies or materials or for labor for any work . . . the cost of which shall not exceed two thousand dollars.

When the cost exceeds two thousand dollars, competitive bidding procedures are established by Section 6119.10.

15. Authority to employ managers, engineers, etc.

The W&S Districts lack express authority to employ managers, engineers, etc. However, this power is deemed to be an inherent power of political subdivisions and can be assumed to exist (See, Appendix A: "Express and Implied Powers").

16. Authority to insure facilities and employees.

The W&S Districts have the express power to insure facilities and employees (Section 6119.06(U), (W)).

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

The W&S Districts are given the express power to acquire, hold, and dispose of real or personal property in the performance of their duties (Section 6119.06(K)). Property no longer believed necessary may be disposed of by private or public sale (Section 6119.06(L)).

Powers to acquire any lands, property, easements necessary for the construction and operation is expressly granted, as is the right of the political subdivisions to lease, lend, or convey its property to the W&S Districts (Section 6119.111).

18. Authority to make, distribute or redistribute loans and grants to other agencies.

    Express authority to promulgate rules and regulations for the giving and administration of W&S District loans or grants to political subdivisions for their acquisition of water resource projects is contained in Section 6119.06(F).

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

    The power to enter into contracts with state agencies or the federal government is necessarily implied from the broadly expressed authority to enter into any necessary contracts to facilitate performance of its duties and to contract with any person or political subdivision to render services (Sections 6119.06(O), (P); 6119.09). For a more detailed discussion, (See, Appendix C: "Geographical Jurisdiction and Intergovernmental Relations ," Regional Water and Sewer Districts).

20. Authority to reassign the unused right of any industries to discharge into the system.

    The authority to reassign any unused industrial rights to discharge into the system can be reasonably implied from several sections of the chapter such as Sections 6119.06(O), (P), (AA); 6119.08(A) and 6119.09. These sections relate to contractual agreements between the W&S District and an industry. It is clear that pursuant to a bilateral modification of the original agreement, any unused right to discharge (and concomitant obligation to pay a share of "industrial cost recovery") can be reassigned to another industry; Ohio contract law would govern.

Absent an express "transferability provision," however, W&S Districts could not unilaterally reassign such unused right of an industry.

21. Authority to invest elsewhere monies raised in excess of current expenditures.

    Section 6119.16 authorizes W&S Districts to invest funds in excess of current expenditures in notes or bonds issued by the federal or state governments or political subdivisions of the state.

22. Authority to contract for private financing.

    The power to contract for financing may be reasonably implied from Section 6119.06(O). To do so, however, would require a liberal interpretation of this statute by the courts.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

    Limited planning powers are conferred upon W&S Districts. They are given the authority to plan for the system of sanitary and/or storm water sewerage (Sections 6119.19-6119.23, inclusive).

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

    The W&S Districts have no authority to engage in residual waste management or solid waste disposal activities.

25. Requirements to consider public input before adopting plans, rules and regulations.

    The accountability of W&S Districts to the electorate depends upon the method of the selection of the board of trustees. This may be done by election or appointment (Sections 6119.02(F); 6119.04(A)(1)). The manner of selection, the number and the term of the members is set forth in the petition for organization of the district.

The only statutory requirement for public participation is that at least ten days' notice be given in a newspaper that a sewerage plan has been prepared (Section 6119.22). There appears to be no legal barriers, however, to W&S Districts' compliance with the public participation regulations listed in Appendix D.

Soil and Water Conservation Districts

Soil and Water Conservation Districts (hereinafter, SWCD) exist primarily for the purposes of studying, planning and implementing projects for the prevention of soil erosion and flood damage and the development, utilization and disposal of water resources. To this end, the SWCDs have been given the power "(t)o do all acts necessary or proper to carry out the powers granted . . ." (Section 1515.08(K)). Consequently, those powers necessary to effectuate a legitimate aim of the districts may be implied.

A. Required Authority

1. Authority to construct and operate a waste treatment works.

   The authority to manage and construct sewage and waste treatment plants may have been given SWCDs by the language

   > . . .implement, construct, repair, maintain and operate preventive and control measures and other works of improvement for . . . the conservation, development, utilization and disposal of water within the district . . . (emphasis added) (Section 1515.08(C)).

   The use of this vague language presents a question of construing the legislative intent. Nevertheless, if the necessity of developing sewage and waste treatment facilities was shown to be related to the carrying out of an explicit study, such as conservation or storage of water, or soil erosion, then the authority might be implied (*See*, Section 1515.08(K)).

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

   The supervisors of a SWCD may accept, without qualification as to source, donations, gifts, grants and contributions of services

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(Section 1515.08(E)). Because of the SWCDs qualify as a local agency for the purposes of the Federal Watershed Act (FWPFPA) (1955 OAG 5020), they may receive federal loans under this program (Sections 3, 8 - FWPFPA, 16 U.S.C., Section 1003, 1006a). The Water and Soil Conservation Commission, within the Department of Natural Resources, may accept the services of the College of Agriculture, Ohio State University, or any state or federal agencies (Section 1515.02, 1515.02(D)).

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

The SWCDs have express authority to charge, alter, and collect rentals and other charges for the use or services of any works of the district under Section 1515.08(J). The express authority to establish the terms of rentals implies that the SWCDs possess the power to base the charges on treatment costs or the characteristics of effluent. If the authority apparently implied under Section 1515.08(K) (See, number 1, supra.) extends to the development of sewage and waste treatment facilities, SWCDs may be presumed to have the power of recovering treatment costs.

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

With SWCDs, as with other agencies herein examined, the capacity for "industrial cost recovery" - the authority to amortize the federally-funded portion of construction costs of treatment works attributable to private industry - is uncertain. Although the supervisors of a SWCD, through the affected board of county commissioners, may levy an assessment upon the property within a SWCD project area, the assessment is clearly for the purpose of paying "the costs of construction of the improvement not otherwise funded" and to repay advances made from the soil and water conservation rotary fund for the same reason (Section 1515. 24). Since the SWCD possesses no other expressly conferred power to levy special assessments, it does not appear presently capable of "industrial cost recovery" through special assessments.

Other methods which might be available to SWCDs to accomplish the "industrial cost recovery" requirements are permit charges, connection charges, and user charges. The latter are authorized by Section 1515.08(J) which empowers SWCDs "(t)o charge, alter, and collect rentals and other charges for the use of services of any works of the district." Finally, SWCDs may enter into binding, contractual agreement with private industry which obligate the latter to repay its share of "industrial cost recovery."

The problems inherent in complying with this requirement of the FWPCAA are largely the same for all political subdivisions under analysis (See, e.g., Municipal Corporations, number 4, infra.). Since the authority of SWCDs to operate a waste treatment works is itself in doubt, a separate discussion of the possible problems encountered in complying with the FWPCAA's "industrial cost recovery" requirements is not included in the SWCD section.

5. Authority to incur short-and long-term indebtedness.

The SWCDs have no authority to issue general obligation bonds. Because Sections 1515.10 and 1515.28 provide for the levying of taxes to finance construction and improvements, the authority cannot be implied. SWCDs also lack the power to issue revenue bonds.

Only the board of county commissioners may issue notes and bonds in anticipation of the collection of a tax levy or special assessment, and then only when a joint project, as defined by Sections 1515.20, is being undertaken (Section 1515.24). The omission of a like provision when a single SWCD is involved argues against the implication of this power in the case of a project not involving more than one SWCD (See Section 1515.10).

While SWCDs possess very limited powers to incur debt, it may be worthwhile to note that they possess other financing techniques unavailable to most of the other political subdivisions included in this report. First, a board of county commissioners in which there is a SWCD may levy a tax within the ten-mill limitation and hold the proceeds in a special fund for construction and maintenance of SWCD improvements (Section 1515.10). The SWCDs may then receive matching funds from ODNR, subject to an $8000 limitation (Section 1515.14(B)) plus an additional annual payment of $200 from ODNR (Section 1515.14(A)). Second, SWCDs may receive, through the board of county commissioners, monies from the state soil and water conservation rotary fund (Section 1515.14)

> (t)o enable such district to pay all or part of the cost of surveys and plans, appraisals, estimates of cost, land options and other incidental expenses in constructing works of improvement for a (SWCD).

Third, the state may share costs, not to exceed 50 percent of the nonfederal cost of the project, of works and improvements of SWCDs (Section 1515.16). This funding is accomplished pursuant to an agreement between the director of ODNR and the board of county commissioners with approval of the Ohio Soil and Water Conservation Commission. Fourth, the board of county commissioners may levy special assessments to pay the cost of SWCD improvements not otherwise funded (Sections 1515.24 - 1515.26). Fifth, under certain circumstances and conditions, the board of county commissioners may levy a tax outside the ten-mill limitation to pay the cost of improvements not otherwise funded (Section 1515.28). Sixth,

> the board may issue bonds and notes in anticipation of the collection of taxes levied under (Section 1515.28), and notes in the anticipation of the issuance of bonds (Section 1515.28).

6. Authority to charge each participating community its proportionate share of the treatment costs.

Section 1515.08(J) empowers SWCDs "(t)o charge, alter, and collect rentals and other charges for the use or services of any works of the district." Section 1515.08(H) authorizes SWCDs

> (t)o make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers . . .

These sections would appear to provide adequate authority from which the power to charge each community its proportionate share of treatment costs could be implied.

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

Refusal of municipal waste for noncompliance with an areawide plan is nowhere provided in Chapter 1515.

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

Assuming that the authority for SWCDs to own and operate a waste treatment works could be implied from Section 1515.08(C), then they would have the implied authority to accept industrial wastes for treatment (Section 1515.08(H, K); (*See*, Appendix B: "Public Utilities," Generally). Furthermore, they would also have the implied authority to refuse industrial wastes when the noncompliance was related to the use of the treatment works (Section 1515.08(F));(*See*, Appendix B). This authority would be moot, however, if SWCDs lack the power to own and operate waste treatment works (*See*, number 1, *supra*.).

9. Authority to impose land use controls.

The SWCDs have no authority provided to impose land use control.

10. Authority to acquire land through condemnation and eminent domain.

The powers of condemnation and eminent domain are not given to the SWCDs. Since the authority to acquire by purchase or gift is provided (Section 1515.08(C)), this exclusion must be deemed as an intentional limitation upon their powers.

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

The authority to refuse additional hook-ups is not given and cannot be implied.

11(b) Authority to impose civil or criminal sanctions.

The SWCDs have no power to impose any form of sanction. They do possess, however, the power to sue and be sued in their own name (Section 1515.08(G)).

12. Authority to require communities and/or industries to participate in the waste treatment system.

There is no power in the SWCDs to compel a political subdivision or industry to participate in a waste treatment facility.

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

No power to enter, inspect, or monitor sewage plants or private industries is expressed or necessarily implied.

14. Authority to contract work to other agencies, private corporations, or persons.

Express authority to enter into agreements with the occupiers of land to carry out SWCD projects is given in Section 1515.08(D). Subject to requirements concerning the letting of a contract, the SWCD may enter into any and all contracts necessary or incidental to the performance of its duties (Section 1515.08(H)). Express authority to contract with the ODNR for control over lands within the SWCD is conferred in Section 1515.08(I).

15. Authority to employ managers, engineers, etc.

    Section 1515.09 authorizes employment of such personnel as is deemed necessary to carry out the SWCD's function.

16. Authority to insure facilities and employees.

    The authority to insure employees and facilities is considered an inherent or essential power (See, Appendix A, "Express and Implied Powers"). Moreover, surety bonds must be executed for all employees and officers entrusted with funds (Section 1515.07).

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

    The power to hold real property in fee for leasehold is expressly given in Section 1515.08(C). Acquisition of personal property is permitted (Section 1515.09).

18. Authority to make, distribute or redistribute loans and grants to other agencies.

    No express authority to make loans or grants is given to the SWCDs. However, discretionary authority to "determine distribution of funds" allocated by the state is lodged in the state Soil and Water Conservation Commission (Section 1515.02(A)).

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

Express authority to contract with the ODNR for control of land within the SWCD is given in Section 1515.08(I). The power to enter into any and all contracts necessary to its functioning as a SWCD is also a basis for asserting the right to contract with federal or other state agencies. But because this grant of power is immediately conditioned upon the following bid procedures customary for private contractors, the drafting of this section conceivably could present a problem (Section 1515.08(H) (1) - (4)). In practice, the functioning of a SWCD as a Federal Watershed Protection and Flood Prevention Act agency means that it does have the power to contract for loans with the U.S. Department of Agriculture (16 (U.S.C. 1006a). Presumably the broad contractual power clause would also be read as giving authority to contract with state agencies other than the ODNR (See, Sections 1515.08(H),(K)).

The authority to construct facilities does not automatically extend to a watershed area. If the intended improvement would benefit an area beyond the SWCD, the board, or a joint board, of the county, or counties, affected must approve the project (Sections 1515.20, 1515.21, 1414.22).

20. Authority to reassign the unused right of any industries to discharge into the system.

The authority to reassign the unused right of an industry to discharge into the treatment system is not given in Chapter 1515. Pursuant to a SWCD's contractual powers (Section 1515.08(H)), however, it possesses the authority to bilaterally agree with an industry to reassign an unused right to discharge (and the concomitant obligation of the industry to repay its proportionate share of "industrial cost recovery"). Absent an express "transferability clause" however, SWCDs lack the authority to unilaterally reassign such as unused right.

(This paragraph assumes the authority of SWCDs to own and operate waste treatment facilities. If the authority does not exist, the question of reassigning an unused right to discharge is moot.)

21. Authority to invest elsewhere monies raised in excess of current expenditures.

Freedom to invest unspent monies is not provided. Rather, the excess must be reserved in a fund for the maintenance of improvements (Section 1515.24; See, Section 1515.10).

22. Authority to contract for private financing.

The SWCDs possess no express authority to contract for private financing. Since permissable sources of revenue are enumerated, the omission must be considered intentional. (See, Sections 1515.14, 1515.15, 1515.16, 1515.10, 1515.08(E), 1515.24).

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

Express authority is provided to:

> . . . develop plans for the conservation of soil resources and for the control and prevention of soil erosion and works of improvement for flood prevention and the conservation, development, utilization and disposal of water within the district . . . (Section 1515.08 (B)).

Other planning-related powers of SWCDs include the authority

> (t)o conduct surveys, investigations, and research relating to the character of soil erosion, floodwater and sediment damages, and the preventive and control measures and works of improvement for flood prevention and the conservation, development, utilization, and disposal of water needed within the district, and to publish the results of such surveys, investigations, or research . . .

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

The SWCDs have no authority to engage in residual waste management or solid waste disposal functions.

25. Requirements to consider public input before adopting plans, rules and regulations.

The supervisors of a SWCD are accountable to the electorate and the electoral process as they enter office through an election conducted every three years (Section 1515.05).

SWCDs have no statutory requirements to develop procedures which ensure public participation in their decision-making process. There appears to be no legal barriers, however, for the SWCDs to develop such procedures as are listed in Appendix D.

Regional Councils of Government and Regional and County Planning Commissions

Councils of Government (hereinafter, COG) are authorized under Chapter 167 of the ORC. A COG may exercise only such governmental powers of its members as are explicitly given to it (ORC Section 167.02(C)). Its primary function is that of promoting intergovernmental cooperation. As noted above, there is no COG in the Miami Valley Region.

A. Required Authority

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

   A COG has the right to receive money, real or personal property, or services, from any state agencies or subdivision thereof, and the right to receive funds, grants, gifts and services from the federal government, Section 167.06 (A) - (B).

B. Ancillary Authority

14. Authority to contract work to other agencies, private corporations, or persons.

    A COG may contract with other public or private parties for planning (Section 167.03, 167.05, 167.08).

15. Authority to employ managers, engineers, etc.

    Employment of staff is provided for in Section 167.05.

16. Authority to insure facilities and employees.

    The authority to insure employees and facilities is implied.

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

A COG may acquire real or personal property by gift or purchase.

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

A COG may enter into a contract with the federal government "when it contributes cash or professional or technical services as part consideration for accepting funds . . ." (OAG 68-004).

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

A COG may plan for water quality of a region, including land use planning.

Regional and County Planning Commissions are organized under ORC Chapter 713. The MVRPC is the sole agency which operates throughout the five county Miami Valley region, performs region-wide planning in a wide range of fields (including water quality control under Section 208 (a) of the Act), is the designated A-95 review agency for the area, and provides an institutional base for the coordinative management of region-wide projects.

Regional and county planning commissions are not authorized by statute to engage in certain of the functions required by Section 208(c) of the Act, e.g., to raise revenues or incur indebtedness. A regional planning commission, however, is given broad powers to

> "accept, receive, and expend funds, grants, and services from the federal government or its agencies, from departments, agencies, and instrumentalities of this state or any adjoining state or from one or more counties of this state or any adjoining state or from any municipal corporation or political subdivision of this or any adjoining state, including county, regional, and municipal planning commissions of this or any adjoining state, or from civic sources, and contract with respect thereto, either separately, jointly, or cooperatively, and provide such information and reports as may be necessary to secure such financial aid."

ORC Section 713.23, although entitled "Powers and Duties of County and Regional Commissions," is in part merely permissive and in part a non-limiting enumeration of specific duties. Subsection (B) specifies that the duties of the planning commission "include but are not limited to" those mentioned.

Subsection (7) under section (B) imposes the following duties on the Commission:

a. undertaking other studies, planning, and programming;

b. conducting experimental or demonstration projects found necessary in the development of plans for the region or county; and

c. coordinating work and exercising all other powers necessary and proper for discharging its duties.

Sewer Districts; County Sewers

Chapter 6117 of the ORC, entitled, "Sewer Districts; County Sewers," is the basic enabling legislation for water pollution control by counties. Although Chapter 6103, "County Water Supply System," has a few relevant sections, Chapter 6117 provides the bulk of the authority for a county's management role under Section 208 of the FWPCAA. However, before proceeding to analyze their powers to act as a waste treatment management agency, it is advisable to briefly examine a county's status and role in the Ohio system of government.

The chapter on "Counties" in Ohio Jurisprudence (O-Jur) states in part:

> A county is a subdivision of the state, organized for judicial and political purposes, under provision of the Ohio Constitution. In other words, it is a mere political organization of certain territory within the state, particularly defined by geographical limits. Generally speaking, a county is not considered a . . . separate political entity with any of the attributes of sovereignty. It is rather . . . a wholly subordinate political division or instrumentality, created and existing almost exclusively with a view to the policy of the state at large, and serving as a mere agency of the state for certain specified purposes.
>
> The courts in Ohio . . . regard counties and boards of county commissioners . . . as merely quasi corporations invested with some of the functions characteristic of corporate existence, but with much more limited powers and privileges than belong to true corporations. A county must, nevertheless, be regarded as a corporation for many purposes, and, whatever limitations there may be upon its corporate character, it is in many respects to be treated as a corporation.
>
> . . . The Constitution (Ohio Constitution, Article X, Sections 3,4) authorizes any county to frame and adopt or amend a charter

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> and prescribes the mode by which a county charter commission may be chosen and may proceed to frame and submit a charter for adoption. Such charter may provide for the concurrent or exclusive exercise by the county of any or all of the designated powers vested in municipalities by the Constitution or laws of Ohio. By statute, every county adopting a charter or an alternative form of government becomes a body politic and corporate for the purpose of enjoying and exercising the rights and privileges granted under it by the Constitution and the laws of Ohio . . .
>
> (The omitted paragraph deals with voter approval of a county charter.)
>
> Generally speaking, the function of the county is to serve as an agency or instrumentality of the state for purposes of political organization and local administration, through which the legislature may perform its duties in this regard more understandingly . . . Except as restricted by the state Constitution, the power of the legislature, through which the sovereignty of the state is represented and exercised, over counties, is supreme, and that body may exercise plenary power with reference to county affairs, county property, and county funds. Counties possess only such powers and privileges as may be delegated to or conferred upon them by statute. These powers and privileges must be strictly construed (emphasis added), and may, in general, be modified or taken away.
>
> A county may, nevertheless, be clothed with all such powers and charged with all such duties of a local administrative character, not vested elsewhere by the Constitution, as the General Assembly may see fit to direct. In fact the duties of local administrations are delegated to them in large measure . . . Within their jurisdiction they stand in the place of the state in enforcing the laws and in protecting the life, liberty, and the property of the citizens . . . (footnotes omitted)[1]

Thus, counties have no powers except as delegated to them by the Ohio General Assembly and the Ohio Constitution. As noted above, Article X, Section 3 of the Ohio Constitution empowers counties to adopt a charter form of government to provide for exclusive or concurrent exercise of any or all powers vested in municipalities. However, the Constitution vests no substantive powers in counties as it does with municipal corporations. The powers which will be examined below are derived from acts of the Ohio General Assembly.

A. Required Authority

1. Authority to construct and operate a waste treatment works.

Section 6103.02 authorizes any board of county commissioners to:

> . . . acquire, construct, maintain and operate any public water supply or water works system within its county for any sewer district, and may provide for the protection thereof and prevent the pollution and unnecessary waste thereof.

Section 6117.01 authorizes any board of county commissioners to:

> . . . acquire, construct, maintain and operate such main, branch, intercepting, or local sewer, or ditch, channel or interceptor for the temporary retention of storm water, within any such district, and such outlet sewer and sewage treatment or disposal works within or without such district, as are necessary to care for an conduct the sewage or surface water from any part of the district to a proper outlet, so as to properly treat or dispose of same.

These two sections would provide the basis of the board of county commissioners or authorized county department to act as the areawide management agency for waste treatment works and could, subject to the constraints of operating within a municipal corporation, fulfill the requirements of Section 208 (c) (2) (C). In addition, no waste treatment works are to be constructed by a county sewer district until approval of plans and specifications is received from the board of county commissioners. (Section 6103.02)[2]

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

   There is no express authority in either Chapter 6103 or Chapter 6117 for a board of county commissioners to accept and receive monies including federal grants. However, since Ohio has no central grant administering agency, the legal authority for counties to receive grants should not prove troublesome.[3]

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

   Under Section 208(c) (2) (E) of the FWPCAA, the authority to raise revenues, including the assessment of waste treatment charges is qualified by Sections 204(b)(1)(A) and (B) which require that the applicant for any grant for a treatment works adopt a system of charges to assure that each recipient of waste treatment services pay its proportionate share of the cost of operation of any waste treatment services, and has made the full provision for full recovery from industrial users of the federally-funded portion of the construction cost of the treatment works attributed to the treatment of such industrial users' wastes.

   Under Section 6117.02 of the OIC, the board of county commissioners may establish rates or charges for the use of sewers or sewage treatment or disposal works, " . . . sufficient to pay all the costs of operation and maintenance of improvements . . ." In addition, the same section authorizes the board to establish reasonable charges to be collected for the privilege of connecting to the sewers or sewage treatment or disposal works.

It would appear that the section authorizing the board to establish a system of rates and charges would provide the board with necessary authority to charge users for their proportionate share of treatment costs. Furthermore, although this section does not specify the manner in which the charges shall be determined, a case note and opinion of the Ohio Attorney General following Section 6111.02 notes that " . . . such rates may or may not be uniform throughout the district." Unless charges are specifically determined on some other basis, it would appear that charges could be determined on the basis of quality (characteristics) and quantity of discharge (See, Appendix B: "Public Utilities").

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

Section 204(b)(1)(B) of the FWPCAA requires that the 208 management agency have the authority to recovery from industry the proportionate share of the federally funded cost of construction attributable to it. As noted in the legal critical factors analysis of other agencies, this is a troublesome area.

In view of the fact that county sewer districts have the authority to issue revenue bonds (See, number 5, infra.), one method they have to amortize the cost of construction is through "user charges." This authority appears in Section 133.06 (Uniform Bond Law) which requires that counties secure the indebtedness from the revenues of the county derived from rates and charges and must covenant to maintain sufficient rates and charges to produce adequate revenues. However, if industry alone is to be assessed for the federally-funded share of construction costs, industry will be charged higher rates for equivalent quantities and qualities of discharges. In Appendix B it is stated that the waste treatment management agency may charge some users higher rates when such differentials are based on the cost of treatment, cost of collection, etc. Additionally, an opinion of the Ohio Attorney General states that rates for the use of sewerage treatment and disposal works do not have to be uniform throughout the sewer district, so long as they are reasonable (1964 OAG Number 858). The problem, however, may be that higher rates charged to industry would be partially based on the "industrial cost recovery" requirement of the FWPCAA which is unrelated to the cost of treatment. Until charging such rate differential is expressly authorized by statute or upheld in the Ohio courts, the authority of county sewer districts to accomplish "industrial cost recovery" through "stepped-up" user charges for industry will remain uncertain.

Connection fees would not be an effective means of meeting the "industrial cost recovery" requirement. These fees must be based on the cost of the connection (See, Appendix B: "Public Utilities"). Permit fees would not provide a possible means, either. The permit fee is based on the quantity of flow and the charges are established by OEPA Regulations, the maximum charge being $250 (See, OEPA Regulations, EP-39-03).

Section 6117.30 authorizes a county sewer district to levy special assessments to pay the cost of construction of a sewage treatment or disposal works. However, special assessments must be levied on the basis of the special benefits conferred to real estate and this would provide no authority for assessing industry on the basis of the federally-funded share of construction costs attributable to an industry's use of the treatment works.

The board of county commissioners has the authority to enter into binding contracts with industry to require them to pay in a specified manner for their share of the federally-funded construction costs. However, if this were to be a condition for the treatment of industrial wastes, its effect on industry's decision not to participate in the system must be examined.

5. Authority to incur short-and long-term indebtedness.

The authority of counties to issue voted general obligation bonds is expressed in Section 133.05 of the ORC (Uniform Bond Law). They cannot exceed three percent of the first $100 million of assessed valuation, 1.5 percent of the next $200 million, and $2.5 percent of assessed valuation in excess of $300 million. Unvoted general obligation bonds cannot exceed one percent of the assessed valuation of the county. Section 6117.08 authorizes the board of county commissioners to issue bonds for the construction of sewer improvements.

Section 133.06 expressly authorizes counties to issue revenue bonds for the construction of sewage treatment and disposal works. They are to be secured by the revenues earned by the improvement and are not subject to the general bonded indebtedness limitations found elsewhere.

County sewer districts have express authority to issue bonds in anticipation of the collection of special assessments (Section 6117.25).

6. Authority to charge each participating community its proportionate share of the treatment costs.

As noted in reviews of other legal entities within Ohio, the ability to assure each participating community pays its proportionate share of treatment costs is required by Section 208 (c) (2) (G) of the FWPCAA.

As the Indiana Study notes, this requirement refers not to categories of users or industries, but to participating communities. Insofar as the authorities vested in a board of county commissioners pursuant to Chapter 6117 enable the board to establish charges and rates for the use of sewage improvements, it would appear the board has the authority as a management agency to assure this requirement is met.

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

   Section 6117.01 expressly authorizes the board of county commissioners to make and enforce rules and regulations for the maintenance, protection and use of its sewers and sewer improvements. This provision would give the county sewer district implied authority to refuse wastes from a municipality which was in violation of rules and regulations pertaining to the use of the system. The authority to refuse wastes from a municipality where the acts of violation are unrelated to the use of the treatment works is uncertain.

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

   The authority of county sewer districts to accept for treatment industrial wastes is implied by their authority to own and operate waste treatment works (Section 6117.01).

   It is implicit in their rule-making powers in Section 6117.01 that county sewer districts have the power to refuse industrial wastes when industry is in noncompliance with local, state and federal laws relating to the use of the treatment system. Authority to refuse, however, is uncertain when the noncompliance is unrelated to the use of the system.

9. Authority to impose land use controls.

   The authority to impose land use controls for the unincorporated areas of a county is granted to the board of county commissioners by Section 303.02. Township boards, however, must first approve a county zoning ordinance before it takes effect as law. County zoning regulations extend to the location, height, width and size of buildings; the uses to which property may be put and the density of the population. Section 307.37 to 307.40, inclusive, authorize the board of county commissioners to adopt and impose building codes. Section 711.10 empowers the board to adopt and impose subdivision regulations. Problems in adopting an areawide land use plan may develop, however, because municipal corporations determine the land use regulations for the incorporated areas within counties. Mechanisms for coordinating land use controls among counties and municipalities should be provided for in the areawide plan.

10. Authority to acquire land through condemnation and eminent domain.

Section 6103.25 states, in part:

> If such board and the owner (of land) are unable to agree upon its purchase and sale, or the amount of damages to be awarded therefore,the board may appropriate such real estate, right of way, easement, or right . . .

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

The county sewer districts appear to have some authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan. Section 6117.01 authorizes the board to make and enforce rules and regulations for the use of sewers and sewer improvements within municipal corporations where the municipality-based system is operated by the county or when it discharges into sewage plants owned and operated by the county (emphasis added). Thus, a county would seem to have the implied authority to impose a moratorium on sewer "hook-ups" in a municipality when the latter is violating a county's rules dealing with use of the sewer system. Consequently, if a municipality's sewerage system, which discharges into a facility operated by a county sewer district, does not meet pretreatment standards of the county, it would appear to have the authority to impose a moratorium on all connections to the municipal system. However, the county sewer district would appear to have no more authority than other agencies to refuse a connection to its facilities from an applicant which is located within a noncomplying municipality.

11(b) Authority to impose civil or criminal sanctions.

The sole penalty authorized by Chapter 6117 is Section 6117.99 which allows a maximum fine of $100 for tampering with any sewer or sewage disposal plant constructed under this chapter or refusal to permit inspection of any connections to such facilities. However, the Ohio Constitution gives counties coextensive police powers with municipalities; thus they may make reasonable laws to enforce their rules and regulations so long as they are not in conflict with those of the state. Therefore, counties, through their delegated police powers, appear to be able to establish penalties which are reasonable for the violation of the laws. Counties may enforce their rules and regulations through prosecution in the Court of Common Pleas (Section 6117.37).

12. Authority to require communities and/or industries to participate in the waste treatment system.

A county sewer district has no express authority to require industries or municipalities to participate in the system. The power in all likelihood does not exist. The Ohio Attorney General, in an advisory opinion, has stated that the county commissioners are without authority to require a property owner to connect his premises with a sewer constructed under

Section 6117.01 et. seq. (1955 OAG Number 6059).

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

The authority to enter and inspect sources of water pollution is not expressed. This authority may be implied from the authority to make and enforce rules and regulations for the proper use of its improvements (Section 6117.01). The power of a public utility to require users to monitor their own wastes is incident to the operation of the facility (See, Appendix B: "Public Utilities," Generally).

14. Authority to contract work to other agencies, private corporations, or persons.

The authority to contract work to other agencies or persons is necessarily implied by county sewer districts' express authority to construct such works (Section 6117.27).

15. Authority to employ managers, engineers, etc.

The board of county commissioners has express authority under Section 6117.01 to maintain a sanitary engineering department headed by a sanitary engineer who may hire assistants. It may be assumed that the sanitary engineering department would be charged with the duty of managing the waste treatment works.[4]

16. Authority to insure facilities and employees.

A county sewer district has no express authority to insure facilities and employees. However, this power is an inherent power stemming from the formation and existence of an operational agency (See, Appendix A: "Express and Implied Powers").

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

Counties have express authority to purchase real estate for the construction of authorized improvements from Section 6103.25.

18. Authority to make, distribute or redistribute loans and grants to other agencies.

Counties have no powers, express or implied, to make loans or grants to other agencies.

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

The board of county commissioners is expressly authorized by Section 307.15 to enter into agreements with any municipal corporation or certain enumerated special districts whereby the board is authorized to perform any function or exercise any power which it is possessed of.

Section 307.151 empowers the board of county commissioners and the legislative authority of any municipal corporation to enter into agreements for the control of water pollution.

For a more detailed discussion, (See, Appendix C: "Geographical Jurisdiction and Intergovernmental Relations,"Sewer Districts; County Sewers).

20. Authority to reassign the unused right of any industries to discharge into the system.

The authority to reassign any unused right of industries to discharge into the system is not expressed. One source of authority, however, may be derived from a county sewer district's authority to make rules and regulations regarding the use of connections to the system (Section 6117.01). In any event, the county sewer district and industry could bilaterally agree to reassign such unused right and concomitant obligation to repay the share of "industrial cost recovery." Ohio contract law would govern. However, absent an express "transferability provision" a county sewer district could not unilaterally reassign an industry's unused right to discharge into the waste treatment system.

21. Authority to invest elsewhere monies raised in excess of current expenditures.

County sewer districts have no authority to invest elsewhere monies earned in excess of current expenditures.

22. Authority to contract for private financing.

Counties and county sewer districts lack the authority to contract elsewhere for private financing.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

The board of county commissioners is responsible for the preparation of a plan of sewerage for the sewer district (Section 6117.06). That section states in part:

> (a)fter the establishment of any sewer district the board of county commissioners shall have prepared by the county sanitary engineer a general plan of sewerage and sewage disposal for such district . . . After such plan has been approved by the board, it shall have prepared by the sanitary engineer detailed plans, specifications, and estimates of cost of such parts of the improvements as it is necessary to then construct, together with a tentative assessment of the cost based on such estimate . . .

In addition, counties have an important role in land use planning. A County Rural Zoning Commission (Section 303.04) or a County Planning Commission may assist in recommending a comprehensive plan, or amendments thereto, for the unincorporated areas of the county (Sections 303.04; 303.07; 303.12; 713.22 to 713.27, inclusive).

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

Counties are authorized pursuant to Chapter 343 to pay a large role in residual waste management and solid waste disposal. This chapter authorizes the formation of County

Garbage and Refuse Disposal Districts. Section 343.01 authorizes the district to include all of the territory of the county including municipal corporations, if authorized by the latter's legislative body (See also, Section 343.03). This section authorizes the board of county commissioners to:

> . . . acquire, by purchase or lease, construct . . . maintain, and operate . . . garbage and refuse collection systems within any such district and such garbage and refuse disposal plants and facilities within or without any such district as are necessary for the protection of the public health.

Section 343.01 empowers these districts to issue bonds and notes for construction of necessary facilities. They may also

> make, publish and enforce rules and regulations for the construction, maintenance, protection, and use of garbage and refuse collection and disposal facilities . . . not inconsistent with the rules and regulations of the director of environmental protection.

The board of county commissioners may have prepared by the county sanitary engineer a general plan of garbage and refuse disposal facilities for the district (Section 343.04).

25. Requirements to consider public input before adopting plans, rules and regulations.

County commissioners, being elected officials, are accountable to the electorate.

Notice and hearing requirements before the adoption of an official plan for sewerage (Section 6117.06), garbage and refuse disposal (Section 343.04) subdivision regulations (Section 711.10), and a zoning plan (Section 303.08) are the only public participation requirements demanded by statute. There are no legal barriers, however, for a county's compliance with the procedures listed in Appendix D.

FOOTNOTES

1. 14 O-Jur 2d, COUNTIES, Sections 4-7.
2. *See*, 1964 OAG Number 978.
3. *See*, *supra*, at 5.
4. *See*, 1956 OAG Number 6196.

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Municipal Corporations

Ohio is a constitutional home rule state. Article XVIII, Section 3 of the Ohio Constitution grants to municipal corporations (hereinafter, MC) all powers of local self-government not in conflict with the general laws. It reads:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt within their limits such local police, sanitary, and other similar regulations as are not in conflict with the general law.

A municipality may elect to adopt a charter under Article XVIII, Section 7, but this merely distributes powers and in no way enlarges the powers granted to municipalities under the Ohio Constitution (Perrysburg v. Ridgway, 108 OS 245, 140 N.E. 505, 597 1923). This case also states that the grant of the powers of local self-government to municipalities is self-executing in the sense that no legislative action is necessary in order to make it available to the municipality (See also, Valley View Village v. Proffett, 221 F.2d 412). However, the constitutional grant of power includes only such powers as are local in the sense that they relate to municipal affairs of each particular municipality (Schultz v. City of Upper Arlington, 88 O.App. 281 97 N.E. 2d 218). Under this constitutional grant of power, a municipality may adopt local police regulations which are valid if nondiscriminatory, reasonably related to the health, safety, morals and general welfare of the people, and not in conflict with the general laws of the state (Columbus v. Glascock, 117 O. App. 63, 189 N.E. 2d 889 (1962)).

Section 735.01 of the ORC states that "in each city there shall be a department of public service which shall be administered by a director of public service." The director of public service "shall manage and supervise all public works and undertakings of the city . . ." and these include sewers, drains, ditches, and sewage disposal works (Section 735.02). A municipal corporation, in its charter, is empowered to provide therein for the creation of a board empowered to manage and control public utilities owned by the municipality, and to adopt bylaws and regulations for the protection of such public

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utilities that have "the same validity as municipal ordinances" including provision for criminal prosecution of one who violates a regulation adopted for the protection of the public utility property (Avon Lake v. Burke, 115 O. App. 541, 186 N.E. 2d 94 (1962).

A. Required Authority

1. Authority to construct and operate a waste treatment works.

A municipal corporation may:

> open, construct, and keep in repair, sewage disposal works, treatment plants, and sewage pumping stations, together with facilities and appurtances necessary and proper therefore, sewers and drains, and ditches, and establish, repair, and regulate water closets and privies. (Section 715.40).

In addition, Article XVIII, Section 4 of the Ohio Constitution empowers an MC to:

> . . . acquire, construct, own, lease, and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, . . .

Thus, an MC would have full authority to construct, own, and operate a waste treatment works. The power is both statutory and constitutional, [1] and cannot be limited by the Ohio General Assembly.[2]

2. Authority to accept or receive monies from any source including, but not limited to, federal grants.

Although the authority of MCs to accept monies from any source, including federal grants, is nowhere expressed, there seems to be no doubt that they possess this power under their powers of local self-government derived from Article XVIII, Sections 3 and 7 of the Ohio Constitution. In addition, an Ohio court has stated that MCs are authorized and empowered to accept grants for real estate.[3] Furthermore, the power to accept grants for the construction of public utilities is reasonably implied by the power to contract. An Ohio court has stated that a municipality's right under the constitution to acquire or construct a public utility carries with it the necessary and indispensable right to contract.[4]

3. Authority to assess "user charges" based on the costs of treatment or the characteristics of the effluent.

   Section 720.49 of the ORC authorizes the legislative authority of an MC which operates a sewage treatment or disposal works to charge such rates and rentals which it deems just and equitable to every person, firm and corporation which are served by a connection thereto.[5] Since there is no authority to the contrary, it should be implied that a reasonable charge may be based on the quantity and quality of the effluent, the user's distance from the treatment works, and other factors relevant to the cost of servicing a user (*See*, Appendix B: "Public Utilities"). The *Indiana Study*, however, suggests the advisability of a "proportionate charging provision."[6]

4. Authority to comply with the "industrial cost recovery" requirements of the Act.

   The authority to satisfy the "industrial cost recovery" requirement of the FWPCAA has proven troublesome for the legal authority of every Ohio political subdivision. The *Indiana Study*[7] recommends that the agency in question have

   > the authority to collect from such industrial users all or any part of the construction costs of such treatment works reasonably attributed to treatment of such industrial wastes.

Presumably, the "any part," referred to in the above quote, refers to the federally-funded portion of construction costs. Presently, neither Ohio nor any other state expressly provides any political subdivision with the authority to accomplish "industrial cost recovery."

One method for an MC to assess industry for the use of services is through a connection or "tap-in" charge. However, it is well accepted that these charges must bear a substantial relationship to the cost of making the connection between the landowner and the treatment system. (See, Appendix B: "Public Utilities," Industrial Cost Recovery - Connection Fees.)[8] For this reason, connection fees would not satisfy the requirement of assessing industry its proportionate share of the construction costs.

The MCs have the authority to levy special assessments to finance a portion of the costs of waste treatment works (See, Chapter 727).[9] However, there are several reasons why this method is not recommended for recoverying industry's share of the construction costs. First, they are limited to the benefits conferred upon the property benefited (Section 727.03). Second, although special assessments may be apportioned according to three alternative methods, including in proportion to the benefits resulting from the improvement (Section 727.01), none seems ideally suited to a levy based on a proportionate cost of using a waste treatment facility. Third, the requirement that special assessments be levied uniformly on all property owners benefited by the improvement,[10] would seem to make special assessments unsuitable for singling out industry to repay the federally-funded share of construction costs attributable to its use (See, Appendix B: "Public Utilities," Industrial Cost Recovery - Special Assessments).

Permit fees would not be an allowable means to satisfy the "industrial cost recovery" equipment. They must be based on the costs of issuance and administration (See, Appendix B: "Public Utilities," Industrial Cost Recovery - Permit Fees).

Another means of paying for the construction costs of public improvements is through the charging of rates and rentals, which are called "user charges" in the FWPCAA. The charging of these rentals, in addition to defraying expenditures for maintenance and operating expenses, may be used to retire public utility mortgage revenue bonds (See, number 5, infra.) which have been issued to pay the construction costs of public improvements. In order to charge only industry for the share of federally-funded construction costs, they must be assessed at a higher rate than residential and governmental users. However, there may be legal difficulties with charging industries higher rates which are not based on a differential in treatment costs, distance from treatment works, peak hour demand, etc. (See, Appendix B: Public Utilities," Industrial Cost Recovery). Article XVIII, Section 4 of the Ohio Constitution authorizes MCs to contract with others which desire to use any product or service which the MC may provide. This power would appear to give MCs the right to require industry to enter into binding agreements to repay the federally-funded share of construction costs attributable to industrial use of the treatment works before any wastes are accepted from the latter. However, the effect this requirement would have on an industry opting to treat its own wastes and not participating in the areawide system cannot be overlooked.

5. Authority to incur short-and long-term indebtedness.

MCs have the express authority to issue general obligation bonds (Section 306.40) subject to the limitations of the Uniform Bond Law (Section 133.03).

MCs have the express authority to issue revenue bonds (Section 761.01 to 761.14, inclusive). Article XVIII, Section 12 of the Ohio Constitution provides the basis for the issuance of public utility mortgage revenue bonds. These bonds are not subject to the limitations of the Uniform Bond Law (Chapter 133)[11] and may be issued beyond the general limit of bonded indebtedness prescribed by that Chapter. These bonds are secured by revenues from the improvement and a mortgage on the public utility.

MCs have express authority to issue bonds in the anticipation of the collection of special assessments (Section 133.31).

MCs have the express authority to issue notes in the anticipation of the issuance of special assessment bonds (Section 133.32).

6. Authority to charge each participating community its proportionate share of the treatment costs.

There exists judicial authority that an MC has the power under Article XVIII, Section 4 of the Ohio Constitution to contract with other MCs for the payment of a reasonable amount for servicing the latter with waste treatment disposal.[12] Consequently, there are no legal barriers for MCs to contract with other communities to pay their proportionate share of treatment costs. Furthermore, if the participating communities agreed upon a 'proportionate share' which was based on other factors in addition to the cost of treatment, the requirements of the FWPCAA would still probably be satisfied.[13] Finally, if all the users of the treatment works in a community were paying their proportionate share, the community, itself, would be paying its share of treatment costs.

7. Authority to refuse to receive any wastes from any municipality which does not comply with the areawide plan.

When an MC is the management agency of a waste treatment works, it is empowered to make reasonable rules and regulations for the use and protection of its property. This authority is derived from the general police powers granted by Article XVIII of the Ohio Constitution and Section 715.01 of the ORC. When a municipality which uses the waste treatment facility is in violation of a rule or regulation which is related to the use of the plant, an MC, as the management agency, would probably have the authority to refuse to accept its wastes.[14] However, the blanket refusal of wastes from a municipality may be inconsistent with the water quality goals of the FWPCAA (See, Appendix B: "Public Utilities," Duty to Serve).[15]

8. Authority to accept industrial wastes for treatment; and to refuse to accept industrial wastes when the industry fails to comply with the areawide plan.

An MC has the implied authority to impose sanctions when an industry is in violation of rules and regulations related to the use of the treatment works (See, Appendix B: "Public Utilities," Duty to Serve). Whether the sanction could take the form of an outright refusal to accept the industrial wastes when local, state, or federal pretreatment and effluent standards are not met would probably depend on the existence of a contract between the MC and the industry to service the industry. Authority for an MC to refuse industrial wastes when the noncompliance is unrelated to the use of the treatment works is apparently lacking.

9. Authority to impose land use controls.

The MCs have extensive zoning and land use powers which are derived from their grant of police power from Article XVIII of the Ohio Constitution; consequently, all such regulations must bear a substantial relationship to the health, safety, morals, or general welfare of the area. The Home Rule Amendment (Article XVIII, Section 3) of the Ohio Constitution is self-executing and does not require a municipality to adopt a charter as a prerequisite to the exercise of zoning powers.[16] The zoning ordinance, however, must bear a substantial relation to the protection of the public health, safety, convenience, comfort and prosperity or general welfare.[17] Section 713.06 authorizes the planning commission of an MC to divide the MC or any part thereof into zones for the use of land, buildings, or other structures. When the planning commission certifies a zoning or land use plan to the legislative authority of an MC, the latter may, under Section 713.07:

> . . . regulate and restrict the location of buildings and other structures and of premises to be used for trade, industry, residence, or other specified uses, and for such purposes may divide the municipal corporation into districts of such number, shape, and area as are best suited to carry out the purposes of this section. Regulations may be imposed for each of such districts designating the kinds or classes of trades, industries, residences, or other purposes for which buildings or other structures or premises may be permitted to be erected, altered or used subject to special regulations.

An MC, through its zoning powers, may also regulate the height of buildings and structures (Section 713.08), the floor area ratio of buildings, percentage of lot occupancy and set back lines (Section 713.09).

Section 713.10 states in part:

> In the determination and establishment of (zoning) districts buildings and other structures may be classified on the basis of the nature of the character of trade, industry, profession or other activity conducted or to be conducted therein, the number of persons, families, or other groups units to reside in or use them, the public, quasi-public, or private nature of the use thereof, or upon any other basis relevant to the promotion of the public safety, health, morals, convenience, prosperity, or welfare.

This section would seemingly give MCs authority to use water quality as a basis upon which zoning classifications can be determined.

Section 713.11 empowers the legislative authority of an MC to create a zoning board of appeals to hear and determine appeals from building permit denials, zoning variances, etc. Zoning ordinances have no retroactive effect; however, if a nonconforming use is discontinued for two years, it may not be reinstated (Section 713.15). By its exclusion, it can be assumed that there is no provision for the amortization of nonconforming uses. Thus, there is no authority to phase out an industry, injurious to the water quality in an area, which is located in a district no longer zoned for industrial use.

There is judicial authority in Ohio for the regulation of nonpoint sources of pollution through the issuance of permits. A court has stated that the municipal power to zone includes the power to regulate the removal and stripping of topsoil in certain areas if the regulations bear a substantial relationship to the health, safety, morals, and general welfare. An ordinance that the removal of topsoil in certain areas must be in conformance with a permit issued after application and requiring a $500 per acre performance bond is a reasonable exercise of the police power.[18] This would appear to give MCs the authority to regulate other sources of nonpoint source pollution, such as agriculture and construction run-off, through the operation of a permit program.

MCs have the authority to regulate the subdivision of land (Section 711.101). The legislative authority of an MC may adopt rules and regulations establishing standards and specifications for the construction of streets, sanitary sewers, storm sewers, . . . gutters, and such rules and regulations may require compliance therewith as a condition precedent to the approval of a plat required by Section 711.09 of the city planning commission.[19]

An MC may regulate the erection of buildings or other structures and the sanitary conditions thereof, the repair of, alteration in, and addition to buildings or other structures (Section 715.26).

Section 713.01 authorizes the creation by the legislative authority of an MC of a planning commission. Its duties and powers are stated in Section 713.02. The function of the commission is to prepare a comprehensive plan for the use of land in the municipality and to recommend the same to the legislative authority of the MC. It has no lawmaking powers. However, it is mandatory that ordinances seeking zoning changes be referred to the planning and zoning commission before a municipal council may enact them.[20] In addition, the legislative authority of an MC may delegate authority to the commission to control the height, design, and location of buildings (Section 713.04).

A municipal planning commission may make plans and recommendations as to land located outside an MC which in the opinion of the commissioners is related to the planning of the municipality, although the land is located in an adjoining county.[21]

Finally, the planning commission may accept, receive, and expend funds, grants, and services from the federal government or its agencies, from departments, agencies, and instrumentalities of this state or any adjoining state or from one or more counties of this state or any adjoining state or from any municipal corporation or political subdivision of this or any adjoining state, including county, regional, and municipal planning commissions of this or any adjoining state . . . (Section 713.02)

10. Authority to acquire land through condemnation and eminent domain.

Section 715.21 of the ORC authorizes MCs to acquire by purchase, lease, condemnation or otherwise and hold real estate and other property for the use of the MC. Article I, Section 19 of the Ohio Constitution authorizes the taking of private land for a public use when just compensation is paid. Article XVIII, Section 4 of the Ohio Constitution authorizes the acquisition of a public utility by condemnation.

B. Ancillary Authority

11(a) Authority to refuse additional "hook-ups" from any or all users in a municipality which does not comply with the areawide plan.

The refusal of "hook-ups" from any or all users in a municipality which does not comply with the areawide plan is a lesser and more realistic sanction than the blanket refusal of a municipality's wastes (See, number 7, supra.). When a specific point source or sources is the cause of a municipality's noncompliance, an MC has the authority to refuse additional "hook-ups" from that source (See, Appendix B: "Public Utilities," Duty to Serve). In the situation where the municipality already is in violation of rules relating to the use of the areawide facility or where new connections would result in overloading, an MC would have the authority to prohibit additional "hook-ups" under its rule-making powers. But, where the applicant is in compliance with the areawide plan and requests service directly from the areawide facility, authority is lacking for an MC to deny it service on the basis of being located in a noncomplying municipality. Finally, when a municipality's noncompliance is unrelated to the use of the treatment works, the authority to refuse it additional "hook-ups" is uncertain.

11(b) Authority to impose civil or criminal sanctions.

The MCs may sue and be sued (Section 715.01). They may prosecute one who violates a regulation adopted for the protection of public utility property [22] and may establish penalties for such offenses. The penalties need not be identical with those established by the state for the same offense.[23]

When an MC operates a public utility, it can enforce the collection of "user charges" by making those unpaid a lien upon the land (Section 729.49).

MCs may enjoin any construction in violation of a zoning ordinance enacted under Chapter 713 (Section 713.13). Section 711.102 authorizes a maximum fine of $1000 for a willful violation of a subdivision regulation.

There should be no difficulty in upholding an MC's power to levy surcharges and penalties for noncompliance with the use of the treatment works when the charges are related to increased costs stemming from the violation. In addition, there is judicial authority for an MC to impose criminal penalties for a violation of a regulation adopted for the protection of public utility property.[24]

12. Authority to require communities and/or industries to participate in the waste treatment system.

The MCs have no authority to require political subdivisions and/or private industry to participate in the waste treatment system.

13. Authority to enter, inspect, and monitor the premises and the discharges of users of the system.

The power for an MC to enter, inspect and monitor the premises of a discharger is nowhere expressed. However, the requirement that a user of the system monitor its own discharges at its expense is a reasonable rule (See, Appendix B: "Public Utilities"). In addition, an MC should have the authority to pass laws incident to its police powers which give one of its agents or that of the department of public service authority to enter and inspect the property of the system's users.

14. Authority to contract work to other agencies, private corporations, or persons.

The MCs are expressly authorized to contract work to other agencies, private corporations or persons by Article XVIII, Section 4 of the Ohio Constitution.[25] The authority and limitations of the contracting power of the director of public service of an MC is detailed in Sections 735.05 to 735.09, inclusive.

15. Authority to employ managers, engineers, etc.

The management of a municipally-owned public utility is vested in a board comprised of three members appointed by the mayor with the consent of the legislative authority (Section 735.03). Additionally, Section 735.04 states:

> the director of public service may establish such subdepartment as is necessary and determine the number of superintendents, deputies, inspectors, engineers, . . . and other persons necessary for the execution of the work and the performance of the duties of this subdepartment.

Thus, MCs have the express authority to hire managers, engineers, etc.

16. Authority to insure facilities and employees.

The authority to insure facilities and employees is a power inherent in the authority of a political subdivision to own and operate such facilities and to hire and retain employees (*See*, Appendix A: "Express and Implied Powers").

17. Authority to acquire by gift or purchase, hold in fee or by leasehold, and dispose of real and personal property.

Section 715.01 expressly authorizes MCs to:

> . . . acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any authorized municipal purpose, and may hold, manage and control such property . . .

In addition, it is a proper exercise of self-government under Article XVIII, Section 3 of the Ohio Constitution for an MC to acquire, lease, hold and dispose of real and personal property.

18. Authority to make, distribute or redistribute loans and grants to other agencies.

An MC's right to make loans and grants to other agencies is neither expressed nor implied. This authority is not granted by statute and should not be considered a power of local self-government granted under the Ohio Constitution.

19. Authority to enter into contracts with local, county, regional and state agencies and the federal government.

Article XVIII, Section 4 of the Ohio Constitution expressly authorizes an MC to contract with others for any product or service furnished by a public utility. In addition, Section 715.02 of the ORC empowers:

> (t)wo or more municipal corporations (to) enter into an agreement for the joint construction or management . . . of any public work, utility or improvement, benefiting each such municipal corporation . . .

Furthermore, an Ohio court has stated that the power to acquire or construct a public utility carries with it by necessary implication the right to contract (_See_, number 2, _supra_.).

Finally, Section 307.151 authorizes the legislative authority of an MC and board of county commissioners to enter into agreements for the control of water pollution. For a more detailed discussion, (_See_, Appendix C: "Geographical Jurisdiction and Intergovernmental Relations," Municipal Corporations).

20. Authority to reassign the unused right of any industries to discharge into the system.

There is no express authority for an MC to reassign any unused right of any industry to discharge into the system. However, there seems to be little doubt that an MC could enforce a contractual obligation of an industry to pay its agreed upon share of industrial cost recovery although part or all of its right to discharge into the system remained unused. Furthermore, there is no doubt that both industry and the MC could agree to reassign any unused right to discharge into the system and concomitant obligation to pay the share of industrial cost recovery. But, without express authority, it is doubtful that an MC could reassign an unused contractual right, at the objection of the industry, for it to discharge into the system.

Article XVIII, Sections 4 and 6 of the Ohio Constitution and several decisions[26] authorize an MC to receive wastes from outside its boundaries when unused capacity exists, but it may not serve inhabitants outside the municipality indiscriminately.

21. Authority to invest elsewhere monies raised in excess of current expenditures.

The MCs have no authority to invest elsewhere monies raised in excess of current expenditures. The OAG has stated that the surplus from such rentals may be used for the extension of the sewage system to serve an unsewered area.[27]

22. Authority to contract for private financing.

The MCs have no authority to contract for private financing.

23. Authority to engage in planning related to the water quality of the region including, but not limited to, land use planning.

For a discussion of the planning powers of an MC, (See, number 9, supra.).

24. Authority to engage in public health functions including, but not limited to, residual waste management and solid waste disposal.

Pursuant to Chapter 3709, a health district may be formed for a city which is under the direction of a board of health (Section 3709.05). Pursuant to Chapter 3734, the board has important functions regarding solid waste disposal. Section 3734.04 empowers the board to

> . . . provide for the inspection, licensing, and enforcement of sanitary standards for solid waste disposal facilities and sites . . .

No person is permitted to operate a solid waste disposal site or facility without first obtaining a license from the board of health (Section 3734.05). License fees are to be paid into a special fund (Section 3734.06). Section 3734.07 endows upon the board inspection powers; and Sections 3734.09 to 3734.11, inclusive, and Section 3734.99 provide the board with full enforcement powers, including the authority to levy fines for violations.

25. Requirements to consider public input before adopting plans, rules and regulations.

The mayor and legislative authority of an MC are elected officials. The director of public service is appointed by the mayor (Section 735.01). The planning commission consists of the mayor (elected official) and the director of public service plus four members appointed by the mayor (appointed officials)(Section 713.01).

There are no legal barriers for an MC to adopt public participation requirements such as those listed in Appendix D.

FOOTNOTES

1. *See*, *Swank v. City of Shiloh*, 166 OS 415, 143 N.E. 2d 586; *Cleveland v. Ruple*, 130 OS 465, 200 N.E. 507.

2. *See*, *Pfau v. Cincinnati*, 142 OS 101, 50 N.E. 2d 172; 1952 OAG 1533.

3. *Stambaugh Auditorium Association v. Youngstown*, 73 O. App. 234, 55 N.E. 2d 672.

4. *State v. Mitchell*, 46 App. 59, 18 N.E. 579.

5. *See Dennison v. Martin*, 40 Misc. 1, 210 N.E. 2d 912 (1964); *Colley v. Englewood*, 80 O. App. 540; *Pfau v. City of Cincinnati*, 142 OS 101, 50 N.E. 2d 172.

6. *See*, *Indiana Study*, Appendix A at 8-9.

7. *Id*. at 10.

8. *See*, *Englewood Hills v. Englewood*, 14 O. App. 2d 195, 237 N.E. 2d 621 (1967).

9. *See*, *Giesel v. Broadview Heights*, 140 Misc. 70, 236 N.E. 2d 222 (1968).

10. *See*, *Colley v. Englewood*, 80 App. 540.

11. *State v. Defiance*, 167 OS 313, 148 N.E. 2d 221.

12. *See*, *Cleveland v. Cuyahoga Heights*, 81 O. App. 191, 75 N.E. 2d 99; *Dennison v. Martin*, 4 O. Misc. 1, 210 N.E. 2d 912 (1964).

13. *See*, *Indiana Study* at 56.

14. *See*, *Avon Lake v. Burke*, 115 O. App. 541, 186 N.E. 2d 96 (1962).

15. *See*, *Indiana Study* at 57-60.

16. *See*, *Valley View Village v. Proffett*, *supra*.

17. *State v. Joseph*, 139 OS 229, 39 N.E. 2d 515.

18. *See*, *Miesz v. Mayfield Hts.*, 92 O.App. 471, 111 N.E. 2d 20.

19. 1962 OAG 3285.

20. Vito v. Garfield Hts., 94 O. Abs. 21, 200 N.E. 2d 501 (1962).

21. 1954 OAG 3805.

22. *See*, *Avon Lake v. Burke*, *supra*.

23. *See*, *Kistler v. City of Warren*, 58 O. App. 531, 16 N.E. 2d 948.

24. *See*, *Avon Lake v. Burke*, supra.

25. *See also*, *State v. Mitchell*, 46 O. App. 59, 18 N.E. 739. The expressly granted power to a city to construct sewers, drains, and sewage disposal works carries by necessary implication full power to make and enter into contracts necessary or proper for exercise of such power, unless such contracts are prohibited by statute or are against public policy. *Cleveland v. Cuyahoga Heights*, 81 O. App 191, 75 N.E. 2d 99.

26. *State v. Kellogg*, 149 OS 461, 79 N.E. 2d 319.

27. *See*, *City of Middletown v. Middletown City, Conn*. 138 OS 596, 37 N.E. 2d 609, 1961 OAG 2078.

APPENDIX A

Express and Implied Powers

The focus of this section of the report is the power or authority of the various political subdivisions, agencies, and special districts of the State of Ohio which may be called upon to implement and manage various portions of the areawide plan pursuant to the FWPCAA. Where a political subdivision is required to act, there is little problem when that entity is expressly authorized to act either through authority granted by the Ohio Constitution or state enabling legislation. But there are many situations where a political subdivision may be empowered to act although not expressly authorized to do so. Thus, the question arises as to when a political subdivision of the state possesses implied or inherent powers to perform a specific function although its authority to perform the function is not expressed. This, in turn, will depend on the nature and special characteristics of the political entity in question and the specific provisions of the state's grant of powers, including both the Constitution and the state enabling legislation.

Generally speaking, it is desirable for a management agency to rely upon powers expressly conferred when performing a function required by the FWPCAA rather than its implying authority from another power which has been expressly conferred.[1] Usually, it will be the state courts that are the final arbiters in deciding whether a certain power may be implied from another expressly granted.[2]

Most of the legal theories which have been developed on the topic of express and implied powers have dealt with those of municipal corporations. However, many of the principles which have been developed are also applicable to other political subdivisions and agencies of the state.[3] In some instances, enabling legislation or opinions of the Ohio Attorney General will specify when grants of power to political subdivisions should be given a liberal interpretation. Since Ohio is a constitutional home-rule state, the powers of municipal corporations will be treated separately in the section construing their power to act as management agencies under Section 208(c) of the FWPCAA.

There are three types of powers which may be possessed by a political subdivision of a state: (a) those expressly granted; (b) those necessarily implied to make effective the expressly granted powers; and (c) those that are both essential and indispensible to the existence and functioning of the particular kind of governmental entity.[4] In the context of municipal corporations, the United States Supreme Court stated that they "have only such powers of government as are expressly granted them or such as are necessary to carry into effect those that are granted. No power can be implied except such as are essential to the objects and purposes of the corporation."[5] This statement, however, confuses implied powers with essential powers.[6]

> "Implied powers" stem from granted powers, and "essential powers," if it can be said that they are implied from anything, are derived from the nature of the corporate body, and not at all from expressly conferred grants.[7]

Express Powers

While the legislature may generally delegate any power which it possesses to a municipal corporation,[8] there are certain limits on the grant of power to state administrative agencies, special districts, commissions, etc. For example, the power to pass general laws for the protection of the health, safety, morals, and general welfare under the police power cannot be delegated to a sewer and water district. However, the permissible sphere of authority which may be delegated to political subdivisions has been greatly expanded since the early years of administrative law when these agencies were thought to be only empowered to act in a regulatory capacity.

Implied Powers

"Implied powers . . . are limited to those that are necessary to effectively carry out the powers expressly granted."[9] Courts have stated that when the statute confers powers and duties in general terms, all incidental powers necessary to effectuate the purpose of the legislation are included by implication.[10] There are two rules of construction for implied powers: these are the rule of strict construction of powers and the rule of reasonable or liberal construction. The rule of strict construction can be stated as follows:

> Grants of power to (governmental entities) are strictly construed to the exclusion of implied powers not reasonably necessary in carrying out the purposes of the express powers granted . . . (S)o where the legislature has given a specific power, courts rule that others were intended to be withheld. While grants of power to (governmental entities) are strictly construed, yet courts will not so strictly construe a grant of power as to destroy the purpose for which the grant was passed by the legislature body.[11]

However, even within the rule of strict construction, there has not been uniformity of results in determining which powers are necessarily implied from express powers. Sutherland on Statutory Construction states that "the power thus granted may involve a multitude of functions that are discernable only through practical experience."[12] The alternative view is that powers need not be necessarily implied from expressly granted powers, but need only be reasonably or liberally implied.[13] This broader, more liberal view is succinctly stated in the following opinion:

> A (governmental entity) . . . necessarily possesses those powers fairly implied in or incident to the powers expressly conferred . . . It seems to me that the pattern of the law which may be derived from the latter and better considered cases is that this court will give a liberal, sensible and practical construction to statutues conferring power upon cities and afford them prerogatives reasonably incident thereto to enable the city to carry out its legitimate functions. (Replace words 'city' with 'governmental entity')[14]

The rule of narrow construction that powers must be necessarily implied is the traditional common law rule[15] and is firmly embedded in the legal systems of many states. Several states have found it necessary to amend their constitutions to change the common law rule and ensure that powers will be broadly and liberally implied from express powers.[16] In Ohio, the courts appear to give a reasonably liberal interpretation to the powers of political subdivisions. In other words, agencies are given implied powers which are necessary to carry out the purposes envisioned in the enabling legislation. Some chapters creating political subdivisions include a section which specifically states that the authority and powers of the agency will be liberally construed; but the effect this provision will have on implying powers of the agency is uncertain. In any event, the specifics of each situation must be examined individually. Cases and opinions of the Ohio Attorney General should be researched in each case to determine whether authority exists in a given situation; the latter, however, are merely advisory and do not carry the same weight as cases. It is important to remember that no power will be implied if it is in conflict with the express provisions of another statute or the Ohio Constitution.[17] But once it has been determined that a given power shall be implied, it carries the weight of law:

> An express statutory grant of power of the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of power or the performance of duty . . . That which is clearly implied is as much part of a law as that which is expressed.[18]

Essential Powers

These powers, also termed "inherent" and "incidental" powers, are not even recognized by many courts. Where recognized, they can be defined as those powers that are necessarily incident to their corporate existence,[19] as opposed to implied powers which are either necessarily or reasonably required to carry out the ends envisioned by express powers. Essential powers, where recognized, are few in number [20] and include such powers as the right of the corporation to sue and be sued and the right to hire certain types of employees, such as attorneys, architects, and engineers.[21]

"Propriety" Powers

Police powers, those from which statutes and ordinances are passed in furtherance of the health, safety, morals and general welfare, necessarily restrict the permissible uses of land and activities of people. Since they are limitations on freedoms guaranteed in the federal and state constitutions, courts are more apt to take a narrow view toward implying these powers than if they were construing implied "proprietary" powers. Most courts will hold that in order for a police power, such as laws regulating use of land or criminal behavior to be implied, they must be necessary to effectively carry out the powers expressly granted. But since the proprietary or business powers of a governmental entity, such as the operation of a mass transit system or water purification works, do not so limit the guaranteed rights of citizens, courts will be more liberal in implying powers which help effectuate the express powers. Although the liberal rule of construction for proprietary powers is not the majority view,[22] it appears to be the position taken by the Ohio courts.

> NOTE: While municipal corporations will possess both police and proprietary powers in Ohio, and townships, villages and counties may possess both types of powers, other governmental entities, such as administrative agencies and special districts are more likely to possess only proprietary powers. However, some may possess police powers, such as zoning, which are incident to their proprietary powers; these powers must be expressly granted.

Ohio Law

The following paragraphs are largely quoted from 50 Ohio Jurisprudence, second edition (O Jur 2d), "Statutues."

Section 295 states the rule of strict construction.

> Legislative grants (of power) which contain ambiguous words are generally subject to a strict construction[23] and are interpreted most strongly against the grantee and in favor of the government.[24]

Section 295. Rule of Strict Construction.

> Legislative grants which contain ambiguous words are generally subject to a strict construction, and are interpreted most strongly against the grantee and in favor of the government. A grant of a part of the sovereignty of the state is presumed to embrace in its terms all that was intended to be granted at all,[25] so that only such powers

> and rights may be exercised under it as are clearly comprehended within the words of the act[26] (that is, such powers and rights as are specifically [27] or expressly conferred thereby,[28] or derived therefrom by necessary implication).[29] It is not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed.[30] Nor is the grant to be extended by its letter beyond the obvious spirit and meaning of the statute which confers it.[31] It follows from these principles that doubtful claims as to power are to be resolved against the grantee and in favor of the public.[32] That construction should be adopted which is most favorable and advantageous to the public interest and general welfare.[33]

This rule of strict construction, however, is not without its limitations. Section 296 of 50 O Jur 2d, "Statutues" states that

> (w)hen a statute clearly confers a grant of power to do a certain thing, without placing any limitations as to the manner or means of doing it, and no statute can be found prescribing the exact mode of performing that duty of thing, the presumption would be that the General Assembly intended that it should be performed in a reasonable manner (emphasis added)[34] not in conflict with the law of the state, and the grantee of such power is naturally and necessarily vested with a wide discretion to do such incidental things as are reasonably and manifestly in the grantee's interests, particularly where that grantee is the public.

Furthermore, Section 279 of 50 O Jur 2d, "Statutes" states that

> . . . the rule of liberal construction requires only that a statute be so enforced as to effectively meet the beneficial end in view and to carry into effect the will of the legislature . . .

As a result, where a legislative grant of power to a political subdivision is for a beneficial purpose, such as the protection of the environment or control of water pollution, this analysis often adopts the exception to the general rule of strict construction of statutory grants of power. Rather, the analysis will assume the existence of a power through reasonable implication. And a power not expressed will *a fortiori*, be reasonably implied where the Ohio General Assembly has authorized a liberal construction in the enabling legislation, itself.[35]

FOOTNOTES

1. See, Indiana Study at 42.

2. Id. at 43.

3. See, American Light and Power Company v. S.E.C., 329 U.S. 90, 91 L.Ed. 103, 67 S.Ct. 133 (1946). Some courts have stated that the legislative delegation of power to municipal corporations is more liberally construed than the delegation to administrative or executive agencies and is less likely to be held void for vagueness. See, e.g., State v. Smith, 353 Mo. 807, 184 S.W. 2d 593 (1945). However, Sutherland on Statutory Construction, Vol. 2A, Sec. 55.04 takes the opposite view. "Since the main safeguards against abuses of municipal power - the right to withdraw authority or make laws which supersede the delegated power - also apply to agencies, commissions, and special districts, the same principles of delegation of power to municipal corporations should apply."

4. See, Antieau, Municipal Corporation Law, Vol. 1, Sec. 5.01 at 218 (hereinafter, Antieau).

5. Ottawa v. Verey, 108 U.S. 110 at 121, 1 S. Ct. 31, 27 L.Ed. 669.

6. Antieau, Sec. 5.08 at 235.

7. Id., Sec. 5.01 at 218.

8. See, Id., Sec. 5.02 at 219.

9. Id., Sec. 5.03 at 220.

10. See, e.g., State ex rel. Cromwell v. Myers, 80 O. App. 357, 73 N.E. 2d 218 (1947); Maryland v. United States, 165 F. 2d 869 (1947).

11. Antieau, Sec. 5.04 at 222.

12. Vol. 2A, Sec. 55.04.

13. See, Antieau, Sec. 5.05 at 223.

14. Nasfell v. Ogden City, 122 Utah 344, 249 P. 2d 507 at 512 (1952).

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15. Antieau, Sec. 5.05 at 227.

16. N.Y. Const., Art. 9, Sec. 3(c); N.J. Const., Art. IV, Sec. VII, par. 11.

17. *Hancock v. Karel*, 127 Fla. 451, 173 So. 274 (1937).

18. *State v. Nestos*, 48 ND 894, 187 N.W. 233 at 235 (1922).

19. *In re Cramton*, 88 Vt. 435, 92 A. 814 at 815 (1915).

20. Antieau, Sec. 5.08 at 236.

21. *Id*. at 236-237.

22. *Id*. Sec. 5.06 at 230.

23. *See*, *Pontiac Improvement Co. v. Cleveland Metropolitan Park District*, 104 OS 447, 135 NE 635, 23 ALR 866.

24. *See*, *Bank of Toledo v. Toledo*, 1OS 622.

25. *See*, *Ravenna v. Pennsylvania Co*. 45 OS 118, 12 N.E. 445.

26. *See*, *Lima v. Lima Cemetery Asso*.

27. *See*, *State ex. rel Turner v. Sayre*, 12 ONP NS 337, 30 ODNP 513.

28. *See*, *Lake Shore & M.S.R. Co. v. Elyria*.

29. *See*, *Youngstown v. Pittsburgh & W.R. Co.* 3 OCC 214, 2 OCD 121.

30. *See*, *Newton v. Mahoning County*, 26 OS 618.

31. *See*, *State ex. rel. Shoemaker v. Goshen Twp*. 14 OS 569.

32. *See*, *Debolt v. Ohio L. Ins. & T. Co.*, 1 OS 563, affd (US) 16 HOW 416, 14 L ed 997.

33. *See*, *Cleveland R. Co. v. Cleveland*, 97 OS 122, 119 NE 202.

34. For this reason, the power of several of the political subdivisions in the analysis to perform certain acts incident to the carrying out of their express powers has been reasonably implied.

35. See, 50 O Jur 2d, "Statutes," Section 277 at 263.

APPENDIX B

Public Utilities

Generally

The determination of whether a waste treatment plant as envisioned by Section 208(c)(2) of the FWPCAA is considered a public utility under Ohio law is crucial to a determination of the powers and authorities of potential waste treatment management agencies. For example, if waste treatment plants are considered public utilities, the management agency's powers to charge users based on their porportionate share of the cost of the operation of the system and to discontinue service when an industry or municipality is in noncompliance with certain portions of the areawide plan may be impeded.

It has been said that the question of whether a concern is a public utility is a mixed question of law and fact and is determined by the nature of its operation; each case must stand upon the facts peculiar to it.[1] However, the term "public utility" has no uniform meaning throughout the United States and, accordingly, local constitutional clauses and statutes using the term must be checked for judicial interpretations.

In order to determine if a waste treatment facility is considered a public utility in Ohio, it is necessary to examine the characteristics of public utilities. First, the services and products of a public utility will be available to the public generally[3] or represent an acceptance of the public franchise.[4] While a regional waste treatment plant may not be available to serve the general public as individuals, it would be serving the general public in its treatment of municipal wastes. Also, the regional waste treatment plant would be available to industry generally and indiscriminately and also available to any other user large enough to hook up directly with the regional plant or too far removed from a municipal sewage plant that it becomes feasible to hook-up directly with the regional plant. Thus, the regional waste treatment plant satisfies the spirit, if not the letter, of this requirement.

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Second, a public utility implies a public use and service to the public, and the principle determinative characteristic of a public utility is that of service to or readiness to serve an indefinite public, which has a legal right to demand and receive its services or commodities.[5] The word "public" means individuals in general without restriction or selection, to the extent that the capacity of the utility may admit of such service or use; and does not necessarily mean the whole public or all the people in a certain area of a political subdivision.[6] One Ohio court has defined a public utility as follows:

> "Public utility" is a generic term suggesting the devotion to public use of the owner's product or service, that the product or service is available to the public generally and indiscriminately, and that the producer stands ready to serve an indefinite public which has a legal right to receive the product or service furnished, and contemplates a privately owned utility, many of which operate under a franchise, and a publicly owned operation (emphasis added).[7]

Thus, a public utility may be owned and operated by a private corporation but, under Ohio law, if the business is still affected with a public interest, it remains a public utility.[8]

As defined by the Ohio Revised Code, the term "public utility" includes sewage disposal system companies; a sewage disposal system company when engaged in the business of sewage disposal services through pipes or tubing, and treatment works (emphasis added).[9] Also, an Ohio court has said that a sewerage system acquired, constructed, owned and operated by a city within its corporate limits, the service of which is to its inhabitants, is a public utility within the purview of Ohio Constitution, Article XVIII, Section 4.[10]

Thus, although a waste treatment works would not largely be serving the general public as individuals as is the case with the typical public utility such as an electric company, mass transit system or sewerage system, it would be serving the general public indirectly through its collection, treatment and disposal of the wastes from municipal sewerage systems; and would have as a major function the direct treatment of industrial wastes. Therefore, a regional waste treatment works would possess most of the characteristics generally associated with public utilities. And, furthermore, although there is not judicial authority for holding a waste treatment works to be a public utility, there is such authority for holding a sewerage system, a similar type operation, as a public utility.[11] Additionally, there is a statutory definition which includes treatment works in the category of public utilities.[12]

Matters are complicated, however, because of waste treatment works (or any other improvement) owned and operated by a political subdivision of the State of Ohio is outside the jurisdiction of the Public Utility Commission of Ohio (PUCO). Public utilities which are not operated for profit are not subject to the provisions of the Public Utilities Commission Act (PUCA). Section 4905.02 states that:

> . . .(a) public utility includes every corporation, company, copartnership, person or association . . . but excepting such other public utilities not for profit, such other public utilities as are owned and operated by any municipal corporation . . .

Therefore, while a waste treatment plant owned and operated by a governmental entity is still a public utility by definition, it is outside the jurisdiction of PUCO. This raises the question of just how far the legal principles enunciated in the remainder of this section, such as rate-making and the duty to serve, apply to waste treatment plants which are owned and operated by a nonprofit political subdivision. Although these agencies are not supervised by the PUCO, it should be assumed that they cannot arbitrarily and discriminatorily charge certain users higher rates or refuse them service without legal basis. For this reason, the general public utility law is discussed on the following pages and assumed applicable to government-operated public utilities to a large extent. (This law is generally case law and not the statutory provisions of the ORC which do not apply.) The exact extent to which the general public utility law is inapplicable is a crucial factor in determining whether government-owned public utilities can comply with "industrial cost recovery" requirements and can refuse service to persons and municipalities which violate the areawide plan. The precise answer to this question has unfortunately not been given with the degree of assuredness necessary to come to a definitive conclusion.

Duty to Serve

The critical question related to this is whether or not a regional waste treatment management agency, as the owner of a public utility, can refuse service to a municipality or private user for noncompliance with any part of the areawide plan, an authority required under Section 208(c)(2)(H) of the FWPCAA. Related to this is whether the management agency can refuse to accept municipal wastes in situations where either the noncompliance is related to discharge into the treatment system or the noncompliance is unrelated to the discharge. The Indiana Study provides an excellent insight into this area.[13] The report contends that a blanket refusal of municipal wastes, whether the noncompliance is related or unrelated to the use of the treatment system, will be counterproductive to the goals of water quality control. A municipality would have no other alternative than to dump untreated wastes in rivers, lakes and streams. Thus, it is necessary to consider other alternatives under this requirement of the FWPCAA. These might include the authority to refuse wastes from industrial users or categories of industrial users which fail to comply with certain aspects of the areawide plan. Another may be to impose a moratorium on "hook-ups" for an area which is in violation of the plan. A third alternative is to impose sanctions, either criminal or civil, for violations while continuing to provide service. It appears, then, that the key powers which the waste management agency must possess are those to accomplish these alternatives rather than the authority to refuse all the wastes from a municipality.

In Ohio, public utilities have the statutory duty of furnishing reasonably adequate services and facilities[14] without unjust discrimination and at reasonable rates.[15] An Ohio court has stated that public utilities operated by governmental entities have the obligation to serve all living within their jurisdiction fairly and without discrimination.[16] But the duty of a public utility to furnish service to a particular area depends upon the public utility's franchise or contract obligations.[17] Thus, a local government authority may be under no obligation to serve potential customers outside of its corporate limits;[18] and, likewise, a special district operating a public utility may be under no obligation to serve those located outside its area of responsibility.

> The duty to serve the public is limited by the extent of the undertaking by the utility to serve the public; to require a public utility to devote its property to a service which it has never professed

> to render or to the service of a territory which it has never undertaken to serve is tantamount to taking that property for public use without just compensation.[19]

The duty to serve also includes the duty to allow new applicants to share in the remaining supply and to provide them with connections to the service when the character of the area makes this feasible.[20]

A public utility, however, is not required to serve all potential consumers within its service area.[21] Discrimination as to the rendering of services or the furnishing of products may be based upon reasonable classification.[22] The Ohio Revised Code states that "(P)ublic utilities . . . may not make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject them to any undue or unreasonable prejudice or disadvantage."[23] And an Ohio court has stated that "(n)ot every act of discrimination is prohibited, but only such as are undue or unreasonable."[24] And, all consumers in the same class must be treated equally.[25]

It has long been established that public utilities, publicly and privately owned alike, may adopt reasonable rules and regulations on which provision of service by the public utility is conditioned.[26] The reasonableness of the rules is largely a question of fact which would be determined by the PUCO, or if the Commission lacks jurisdiction over the utility, the state courts. Although there is no judicial authority on the subject in Ohio, it appears clear that pretreatment and effluent standards for municipal and industrial wastes and other rules relating to the water quality in an area would be reasonable if technologically feasible and nondiscriminatory.[27]

Also, the majority rule is that public utilities can require users of the services to monitor or meter the amount of the use at their own expense; and service can be conditioned on compliance with these rules.[28]

Just as service may be refused, a public utility may discontinue service to a consumer for noncompliance with reasonable and nondiscriminatory rules and regulations.[29] This service can be discontinued even though the user made significant expenditures in anticipation of the service.[30] A Louisiana court has stated:

> A permit to connect to a sewerage system does not ordinarily create a vested right; it is

> generally subject to modification or termination by lawful change in general regulations, as well as subject to revocation for nonarbitrary cause.[31]

The widely accepted rule, however, is that public utilities cannot refuse or discontinue service for collateral matters - i.e., for controversies unrelated to the service sought.[32]

> The general rule is that a public utility corporation cannot refuse to render the service which it is authorized by its charter or by law to furnish, because of some collateral matter not related to that service. Thus rule has been extended to municipally owned and operated utilities.[33]

This brings in issue whether the waste treatment management agency can refuse to treat municipal and/or industrial wastes for noncompliance with portions of the areawide plan, such as land use regulations, unrelated to discharge into the waste treatment system. Viewing the problem in another way, all aspects of the areawide plan relate to the water quality of the region; but only certain rules and regulations which are part of the plan, such as pretreatment standards, monitoring requirements, and assessment of "user charges" will deal directly with the use of the treatment works. The question becomes whether violation of other rules and regulations of the plan, such as land use regulations and failure to control nonpoint sources of pollution are sufficiently related to the use of the treatment plan to warrant refusal of wastes. A study of cases in a majority of jurisdictions would seem to say that these are collateral matters,[34] but there is an Ohio decision which may prove authority for the opposite view. In the case of Gatton v. Mansfield, an Ohio court allowed the public utility to terminate a consumer's supply of water because of the nonpayment of sewer charges.[35] In this case, the noncompliance dealt with the treatment of water while the refusal of service went to the supply. The court found that the two systems were so closely related that it was a reasonably regulation to provide for termination of the water supply for nonpayment of the sewer bill. A natural extension of this holding would be the authority to terminate the water supply for noncompliance with sewage treatment standards. Another logical extension of this holding is allowing the discontinuance of sewage treatment services for nonpayment of the water bill. But in each of these instances the refusal of service is based upon the "single system" idea of water supply and sewage treatment. In other words, both services really represent different ends of the same system; there being a logically close relationship between the two.

On the other hand, although regulations of the areawide plan unrelated to the use of the treatment works are still part of a system of water quality control, and the operation of a waste treatment works is an integral part of the system; the connection between the former, such as land use controls, and the use of the treatment works is more remote than in the water supply - sewage treatment example. To hold that a violation of regulations unrelated to use of the waste treatment works is still sufficiently related to the plan of water quality control to justify refusal of wastes would represent a significant extension of Gatton.[36] The principle has not been extended, in Ohio or elsewhere, beyond refusal of water supply for nonpayment of sewer service.

In sum, the authority of waste treatment works to refuse wastes from a user for noncompliance with the areawide plan which is unrelated to the use of the system seems to be very uncertain at this time. Legislation is vitally needed in this area if the waste management agency is to comply with Section 208 (c)(2)(H). This authority, however, "greatly increases the power or leverage of the agency to accomplish overall water quality control and not merely control of effluents being treated. As an example, . . . (i)f a municipality fails to control (nonpoint sources of water pollution), it is in violation of the areawide plan, and the agency must have authority to "refuse" to receive any wastes from such municipality."[37]

In Ohio, discharges into waste treatment works are regulated by a permit system administered by the Ohio Environmental Protection Agency (OEPA) under the (NPDES)* program established by Section 402(a) of the FWPCAA. Although other political subdivisions of the state may have express authority to issue, modify, and revoke permits, this authority is preempted by the control of OEPA at the state level. Although many of these political subdivisions which have authority to provide for water quality control in their area of jurisdiction have the express power to refuse discharges into the system in order to prevent and abate pollution of the waters of the state and to make rules and regulations of the discharge of wastes, there may be a potential conflict of authority if such political subdivisions attempt to refuse discharges from a user which has a valid discharge permit issued by OEPA. The Indiana Study suggests the following solution to this conflict:

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*National Pollution Discharge Elimination System

> In the case of refusing wastes, this authority may sometimes resides (sic) in a regulatory agency which may be separate from the agency operating the treatment works. Thus the regulatory agency has the authority to order the cessation of discharge into the system. These problems can be overcome by the two or more agencies working together, and the areawide plan should provide for such cooperation in order that this requirement of the Act can be satisfied without new legislation shifting authority to an agency operating a waste treatment plant.[38]

A key provision relating to the discharge of wastes into regional waste treatment facilities is OEPA Regulation EP-31-04. Subsection (2)(b) authorizes the director of OEPA to deny an application for a permit or the renewal thereof if:

> (he) determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with Section 208 of the Act.

Additionally, OEPA Regulation EP-31-10(A) empowers the director of OEPA to:

> . . . revoke a permit at any time if he determines that any applicable laws, rules, regulations or permit terms have been violated.

The above two regulations, when read together, give OEPA the authority to prohibit discharges into waste treatment works, either through the denial or revocation of permits, when a discharge or source is in noncompliance with the areawide plan. The term "source" is troublesome because it is not defined in the regulations (although "point source" is). But according to principles of statutory construction, "source" should be narrowly interpreted to mean the actual industrial facility or municipal sewage treatment plant and not the lands owned by the industry or land included within a municipality. In other words, the totality of land within a municipal corporation would not be deemed to be the "source," and although a portion of this land was in violation of an areawide plan (for example, in terms of land use or subdivision regulations) OEPA would not have the authority to deny or revoke a discharge permit for such violation.

The authority to refuse waste should include the authority to prohibit new or additional "hook-ups" to the system. In the case where the proposed discharge or source is in noncompliance with the areawide plan, there is no problem in denying a permit. And, there seems to be little problem for finding authority of OEPA to prohibit a municipal waste treatment works from making additional connections when the facility is in noncompliance with the areawide plan (see, Section 6111.03(J)). Furthermore, if additional "hook-ups" would result in an overloading of a treatment works, a refusal by OEPA to issue permits for new connections would seem to be reasonably related to the purposes of the agency.[39] However, when a municipality's noncompliance with the areawide plan is unrelated to the use of the treatment works, such as failure to control agriculture nonpoint sources of pollution, the authority to impose a moratorium on "hook-ups" to the system within its boundaries is very uncertain. To imply this power would require a very liberal interpretation of OEPA's enabling legislation in Chapters 3745 and 6111.

In lieu of a discontinuance of service or a moratorium on additional "hook-ups", there is the alternative of the political subdivision imposing civil and/or criminal sanctions such as fines or surcharges for noncompliance with the areawide plan. If a surcharge is based on increased treatment costs due to noncompliance with the use of the treatment works, no legal problems should be encountered. In Ohio, public utilities may base their charges to users on the cost of providing the service. However, if the charge takes the form of a fine or penalty, legal problems will be encountered. The power to impose fines or other criminal sanctions, such as imprisonment , is one which must be expressly delegated by the Ohio General Assembly. Most political subdivisions in Ohio involved in water quality control have some delegated power to impose penalties for violation of certain of their rules and regulations. However, in many instances, these powers are so narrow or penalties are so slight that it is not likely that they will act as a deterrent to violations. This is an area where the legislature should act to give more powers to the agencies involved in water quality control.

Public Utility Rates

The limitations which public utilities must face in determining the rates which they may charge consumers for use of their services has an important bearing on the authority of a waste treatment management agency to carry out Section 208(C)(2)(E) of the FWPCAA - i.e., to raise revenues, including the assessment of waste treatment charges. This section is qualified by Section 204(b)(1) (A) and (B) of the FWPCAA which provides that

> the Administrator shall not approve any grant for a treatment works unless the applicant (a) has adopted or will adopt a system of charges ("user charges") to assure that each recipient of waste treatment services will pay its proportionate share of the cost of operation of any waste treatment services provided by the applicant, and (b) has made provision for full recovery from industrial users ("industrial cost recovery") of the federally-funded portion of the construction cost of the treatment works attributed to treatment of such industrial users' wastes.[40]

The charges of consumers for public utility services rendered, the rates or rents, are not "taxes" or "special assessments."[41] However, the rule is that the "rates charged . . . for water, light, power, gas, and all other services must be reasonable."[42] The ORC states that charges demanded for services rendered by public utilities are required to be just, reasonable, and not more than the charges allowed by law of the Public Utilities Commission, and no unjust or unreasonable charges may be demanded for the services.[43]

Ohio courts have stated that the reasonableness of a rate is often based on the cost to the political subdivision in providing the services.[44] Section 204(b)(1)(A) of the FWPCAA requires that the rates, or "user charges" assessed to users of a treatment works be determined on the basis of the cost of providing the service. This mandate is based on the policy that each recipient of services pays its proportionate share of treatment costs[45] and that no one's use of the system is "subsidized" by another's use. What this system of charges would envision is that the users' rate charged for a given quantity of discharge would depend on the quality of discharge. This would turn on the constituent components of the effluent (percentage of biochemical Oxygen demand (BOD) and suspended solids)[46], the user's distance from the treatment works, and perhaps the peak hour demand for the services (demand charge).[47]

> As a general rule, the volume and character of each discharge into a publicly-owned system should form the basis of determining the rate at which each user should be required to pay.[48]

Since the calculation of different rates for each point source of pollution based on the character of the discharge and distance from the facility would entail great administrative costs and difficulties, it would definitely be more practicable for the waste management agency to establish different categories of users, each of which would be charged different rates based on the cost of treatment. There is a strong likelihood that US EPA would agree that this method of determining user charges would satisfy the requirements of the Act.[49]

It is a uniform rule of law that utility companies operated by local governments cannot impose unjust discrimination among their consumers in their assignments of different rates.[50] This rule derives from the common law, many state constitutional provisions and follows from the requirement that the fixing of public utility rates must be "just and reasonable."[51] Categorizing different customers into different groups which are charged different rates is justifiable, however, if the differentiation is related to the utility's cost of providing the services.[52] In Ohio, courts, have held that a public utility may not give any "undue or unreasonable preference or advantage" when the circumstances are substantially similar;[53] but when actual differences do exist, relating to the furnishing of the services or the condition of the consumers, the public utility may reasonably discriminate as to rates.[54] The ORC states that

> "public utilities may not directly or indirectly, or by any special rate, rebate, drawback, or other device or method,

> charge or receive from any person, firm, or corporation a greater or lesser compensation for any services than it charges for doing a like service under substantially the same circumstances and conditions (emphasis added).[55]

But, a Texas court has stated:

> It is well established that a . . . public utility has the right to classify customers under reasonable classification based upon such factors as the cost of service, the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a grounds of distinction.[56]

Again, the Ohio courts are in accord with the general rule that the costs of performing the service may be justifiable grounds for rate differentiations:

> While the cost of providing a service or commodity does not determine the rates or charges that may be demanded or collected, such an item is an important element in arriving at a judgement with reference to such rates or charges.[57]

Thus, the cost of performing the service, although not the controlling factor, is a material consideration in the determination of a user's rates.[58]

Thus, in Ohio, as in most states, there is no express authority for waste treatment management agencies to base "user charges" on the characteristics of the effluent. There is ample authority, however, that the rates charged by a public utility may differ on account of variations in the cost of performing the service; and, if reasonable and nondiscriminatory, these rate differentiations are valid. Differences in rates may also be justified by differences in the locality of the consumer.[59] This authority, plus the authority to assess reasonable charges for services,[60] reasonably, and perhaps even necessarily, implies the authority to charge categories of users for their proportionate share of treatment costs.[61] However, this implication cannot be made if a particular political subdivision is required by statute to assess charges by some method which is inconsistent with assessing users on the basis of cost.

Industrial Cost Recovery

There is an additional and even more problematical requirement of Section 208(c)(2)(E) of the FWPCAA. This is the mandate that industrial users pay their proportionate share of the federally-funded construction costs of the waste treatment works. The FWPCAA does not exempt non-industrial users from being assessed for a share of the construction costs; but, if all users are to be assessed, the share paid by industrial users must be segregated and returned to the federal government pursuant to Section 204(b)(3) of the FWPCAA. Prior to its enactment, similar requirements were contained in guidelines[62] and regulations promulgated by the Federal Water Pollution Control Agency. The industrial costs to be recovered included both operating and maintenance expenses and amortization of capital costs attributable to treating industrial waste waters.[63] These regulations are now requirements incorporated into the FWPCAA.

> The amount of payback will be actual cost, or a share of cost, computed on a percentage of the treatment works total capacity used by the particular industry including any firm commitment for increased use by that industry.[64]

> The acceptable systems of charges or methods of raising revenues which comply with the Act will vary depending on the type of treatment works and users being served . . . Methods of "industrial cost recovery" may be a system of user charges, connection fees, license fees or other techniques available under state or local law . . . Assessments on the property being served or a permit fee permitting an industry to discharge into the system are other methods of industrial cost recovery.[65]

The cost of construction of public facilities may be paid through rates and rentals assessed upon users of the facilities. In most instances, general obligation and revenue bonds issued to pay for the construction of treatment works are either permitted to or required to be amortized through the user charges. These charges, however, in order to be deemed reasonable, must be based upon allowable factors such as the quantity and quality of the effluent. A proposed user charge system for one special district in Ohio foresees charging a "tap-in" or connection charge and a minimum charge to all users. Above and beyond these charges, all users will pay a flow charge based on the quantity of flow above a stated minimum and a treatment charge (aimed at industrial wastes) for BOD and suspended solid concentrations which exceed a specified average.[66] An additional demand charge for discharges at peak demand hours is being considered.[67] These charges are all based on the cost of service and appear to be valid under Ohio law.

The authority of the special district to satisfy the "industrial cost recovery" requirement under the proposed plan is uncertain. The county estimates that when federal construction grants are added to the other total annual costs for operation and maintenance of the plant, the total costs are increased by 39 percent, or a factor of 1.39. Since the share of these grants attributable to the industrial use of the treatment works must be recovered from industry and returned to the federal government, the Sanitary Department proposes to increase industrial user charges by a factor 1.39. However, these higher resulting rates which industry will be required to pay are unrelated to the cost of treatment; instead, they are due to the requirement of "industrial cost recovery" in Section 204(b)(1)(B) of the FWPCAA. Thus, the rates charged industry may be held to be discriminatory because of the differential charged to this category of user is unrelated to the cost of providing the service.

Connection Fees

The general rule is that a local government utility can require a consumer to pay a reasonable fee for the connection of the premises to a water main.[68] However, this fee must represent, in order to be reasonable, the actual cost of laying the pipes and making the connections.[69] Although these connection fees would almost assuredly be applicable to waste treatment facilities, it is doubtful whether they could be used to amortize the costs of construction - i.e., if Ohio follows the general rule.

Permit Fees

In Ohio, permit fees must be reasonable and uniform to the extent that differentials be related to the cost of issuing or administering the permit. If the amount exacted is to be considered a fee and not a tax it must be reasonably related to the costs in administering the permit program and policing the permit holder.[70] OEPA has promulgated a schedule of fees for discharge permits which is based on the flow quantity of the discharge (See, OEPA Regulations, EP-39).

Special Assessments

A special assessment is a charge imposed by a local government upon the owners of property specially benefited by a "local" public improvement.[71] They are defined in Ohio as

> charges imposed by public authorities upon property in the immediate vicinity of a public improvement, on account of the cost of the construction thereof, laid with reference to the special benefit which such property derives therefrom.[72]

Since special assessments are not taxes within the meaning of Article XII, Section 2 of the Ohio Constitution,[73] they are not subject to the constitutional requirements of uniformity and equality of taxation and the rule that property must be charged in proportion to its value.[74]

The power to impose special assessments must be clearly conferred, either by statute[75] or by the state constitution.[76] As Ohio is a constitutional home-rule state, municipal corporations are given the power through the Ohio constitution to levy special assessments.[77] In addition, municipal corporations in Ohio have statutory power to levy and collect special assessments for, among other improvements,

> sewers, sewage disposal works and treatment plants, water pumping stations . . . together with the facilities and appurtances necessary and proper therefore . . ."[78]

The power to levy special assessments can also be based on a contract, where permitted, between a public authority and a landowner.[79] The Ohio General Assembly can delegate the power to levy special assessments to local authorities and special districts, but this power is not unlimited.[80]

Special assessments are based on the taxing power but the important distinction between the two is that the basis for levying the special assessment is the special benefit accruing to the property from the construction of the improvement.[81] Special benefits mean those above and beyond those enjoyed in common with the public at large.[82]

Although grants of power to levy special assessments generally will be strictly construed,[83] courts will more readily find that property is specially benefited by local improvements when a governmental entity's power to levy special assessments is expressed.[84]

The state of Ohio places certain constitutional limitations on the levying of special assessments. First, if the assessment is in excess of the special benefits conferred, it is invalid under the constitutional prohibition of the taking of private property for public use without just compensation.[85] Second, if the special assessment is in excess of the value of the property _after_ the improvement, this is also a violation of the constitution as a taking of private property without just compensation.[86] An assessment may be levied against public property where the payment or collection of such assessment may be enforced by means or remedies other than the sale of property.[87] Also, state lands benefited by the improvements may be subject to the special assessments.[88]

Given this preliminary information, it is necessary to determine what property, if any, is subject to special assessments for the construction of a waste treatment works. The narrower question is whether industries are subject to the levy of such assessments. It is ordinarily assumed that the construction of improvements such as waterworks, electric power plants, and mass transit systems cannot be financed through special assessments.[89] It must be assumed that this is so because no property will be specially benefited by the "local" improvements. A "local" improvement, as used in this special sense, means

> improvements that benefit or advantage the immediate locality and assessed property owners therein in a manner and to a degree not enjoyed by the community as a whole.[90]

A "general" improvement, on the other hand, is one that confers substantially similar benefits on the whole community or area.[91] Thus, it might seem at first glance that the construction of a waste treatment works could not be financed through special assessments as the improvement does not seem to specially benefit property owners in the immediate locality of the improvement.

Section 727.01 of the ORC, however, specifically authorizes municipal corporations to levy special assessments for, among other things, sewers, sewage disposal works, treatment plants, and sewage pumping stations. It must be assumed that the waste treatment facilities envisioned by the FWPCAA are encompassed in this authorization. If this power is possessed by the state and capable of delegation to municipal corporations, it also can be delegated to special districts and other governmental entities.[92] If it is the law in Ohio that treatment plants satisfy the "local" improvement requirement they still must specially benefit property before assessments for their construction can be levied.

If a given area is already adequately serviced by municipal sewage disposal facilities, it would not specially benefit from the construction of a regional waste treatment works. Rather, the benefits would be general and consist of improved water quality in the region as a whole. The rule in Ohio is that where property is being adequately served by disposal facilities, it receives no special benefit from the construction of a sewage disposal works and no assessment may be levied for the improvements.[93] In the context of the waste treatment works, this would seem to be authority for the proposition that private users adequately served by sewage disposal facilities would receive no special benefits and could not be specially assessed for the construction of the treatment works. On the other hand, all users, private and public alike, would be specially benefited if they were not being adequately serviced in their disposal of wastes prior to the construction of the regional waste treatment works. Private residences and commercial property without access to sewage disposal works would be specially benefited by hook-ups to the regional waste treatment facility; and this would be evidenced by enhanced use and enjoyment of the property as well as an increase in market value of the property. Probably the greatest special benefit would be conferred upon industry. Not only will they be provided with facilities for their sewage, but they are specially benefited by being able to forego construction of their own treatment facilities for the disposal of their industrial process wastes. Also, municipal property, such as would be specially benefited by their hook-up to the regional treatment works and public property may be subject to the levy for special assessments under Ohio law. Despite these arguments favoring the general power to levy special assessments for the construction of waste treatment works, the authority is tenuous. The traditional type of improvements for which special assessments are levied are streets, lighting, sewers, parks, etc.: in other words, those improvements which specifically benefit "local" or adjacent property by virtue of their being constructed. To the contrary, a waste treatment works generally benefits property in a community or region through the improvement of the overall water quality; property is not specially benefited unless it has direct acess - i.e., a hook-up, to the waste treatment facility. Thus, the power to levy special assessments to cover construction costs of waste treatment works is uncertain even though apparently authorized pursuant to Section 727.01 of the ORC.

Assuming the governmental entity in question did possess the power to levy special assessments for the construction of waste treatment works, the recovery of the federally-funded share which is proportionate to industrial users, seems much less problematical. Section 727.08 of the ORC, expressly authorizes the items of cost which special assessments for public improvements may include. Among these are the cost for labor and materials,[94] invariably the major component of the cost. Section 727.08 also states that the cost of the public improvements is not limited to the enumerated items. In order to satisfy the requirement of uniformity,[95] special assessments must be levied on all lands subject thereto[96] and the apportionment must be fair and just.[97] Section 727.01 allows three alternative methods for ascertaining the apportionment of assessments. The second of these choices is the proportion to the benefits which result from the improvement.[98] In the absence of fraud or abuse of discretion, the assessing authority may choose any one of the enumerated methods,[99] but may not combine two or more the methods.[100] Certain statutes require that special assessments be apportioned according to benefits received; these include conservancy districts,[101] sanitary districts,[102] and county sewer districts.[103] When assessments are apportioned in accordance with the benefits conferred, it is required that the special benefits are at least equal to the amount of the assessment.[104] Assessments exceeding the benefits are unconstitutional.[105] When the assessment is measured by the benefits to the property, the Ohio courts envisioned that the benefit will be determined by the enhancement in the value of that individual property and not the enhancement that accrues to the public or the rest of the community.[106] Because of the unique nature of an improvement such as a waste treatment works (as mentioned earlier) as opposed to improvements such as streets and sewers, the increase in fair market value, the Ohio test, would not be a satisfactory means of measuring the special benefit conferred to property in this case. Indeed, some states have adopted a "fair proportion rule" where the test is whether the assessment represents a fair proportional part of the cost of the improvement in relation to the other specially benefited land within the district.[107] It appears that a method of assessment of this nature would comply with the requirement of Section 204(b)(1)(B) of the FWPCAA which requires that each industrial user pay the proportion of the construction costs proportionate to the costs of treating its discharges into the system. Under the "fair proportion rule" it is reasonable to assume that each industry is benefited by this amount; and, if legislative authority exists, almost any uniform method of apportionment of special assessments has been upheld by federal and state courts if not arbitrary and unreasonable.[108]

In Ohio, there is no authority for measuring the special benefits resulting from the improvements by the "fair proportion rule." Thus, legislative authority could be obtained for this approach only by amending Chapter 727 of the ORC. Also, under the requirement that special assessments be uniform, it is uncertain whether only industry can be assessed for the recovery of construction costs attributable to their use of the system; this is because other users will be specially benefited by the operation of the waste treatment works. Exemptions from special assessments are usually interpreted very narrowly and strictly by the courts.[109] In Ohio, there are no statutory exemptions from special assessments contained in Chapter 727 of the ORC; but a court in Ohio has ruled that, because exemptions from assessments destroy the concepts of uniformity and inequitably cast the burden of paying for the improvement on nonexempted property owners, "a local government is without authority to compromise, abate, or cancel special assessments upon individual properties."[110] In other states. legislatures have authorized and courts have sustained[111] rate differentiations among different classifications of users, such as residential and industrial, as long as they were reasonably and reflected property being benefited to varying degrees.[112] Thus, in Ohio, if industrial users are required to pay their proportionate share of construction costs attributable to their use of the waste treatment facilities, nonindustrial users could not be exempted totally if they were benefited by the waste treatment works. Since industry would be benefited to a greater extent (industrial wastes are costlier to treat than sewage), they apparently could be assessed at a higher rate. And, assessing industrial and nonindustrial users would not violate Section 204(b)(3) as long as the industrial share of cost recovery was segregated and returned to the federal government as required by that portion of the FWPCAA.[113]

Industrial cost recovery, whether accomplished by special assessment, permit or connection fee, or other means, may be based on a contract between the local authority[114] and the user instead of being based on a general levy. Any commitment for an industry to repay its proportionate share should depend not only on current usage but also on prospective uses. Just how firm an industry's commitment to repay will be should depend on the number of industries using the waste treatment works, with the larger the number, the less necessity there being for firm commitments to repay by industry.[115] If industrial users will be required to enter into strong contractual commitments to repay their share of construction costs before hook-up is allowed, this policy should be examined as to its effect on inducing industries to develop their own waste treatment systems.

The acceptable systems of charges or methods of raising revenues which comply with the FWPCAA will vary depending on the type of treatment works and users being served. Irrespective of the system of charges or methods of raising revenues adopted by a waste treatment management agency, the system or method, or a combination of the two, must assure that each category of user pays its proportionate share of treatment costs and must be within the legal capacity of the agency to implement.[116]

FOOTNOTES

1. Motor Cargo, Inc. v. Board of Township Trustees, 52 O Ops 257, 117 NE 2d 224; Industrial Gas Co. v. P.U.C.O. 135 OS 408, 21 NE2d 166.

2. Antieau, Sec. 19.00 at 19-3.

3. Southern Ohio Power Co. v. P.U.C.O., 110 OS 246, 143 N.E. 700.

4. Adena R. Co. v. Public Serv. Com., 92 OS 1, 110 N.E. 631.

5. Motor Cargo Inc. v. Board of Township Trustees, supra.

6. See, 45 O Jur. 2d, Public Utilities, Sec 2 at 166; See also, 64 Am. Jur. 2d, Public Utilities, Sec. 1.

7. Columbus ex rel. Willits v. Cremean, 27 O. App. 2d 137, 273 N.E. 2d 324.

8. Industrial Gas Co. v. P.U.C.O., 135 OS 408, 21 N.E. 2d 166.

9. ORC Sec. 4905(A)(14).

10. Mead Richer v. Toledo, 114 O.App. 369, 173 N.E. 2d 709 (1961); Dennison v. Martin, 4 Misc 1, 210 N.E. 2d 912 (1964).

11. See, n. 9, supra.

12. See, n. 10, supra.

13. See, Indiana Study at 57-60.

14. ORC Sec. 4905.22.

15. 45 O Jur 2d, Public Utilities, Sec. 61 at 213.

16. Mt. Sinai Hospital v. Hickey, 137 OS 474, 30 N.E. 2d 802 (1941).

17. East Ohio Gas Co. v. Akron, 81 OS 33, 90 N.E. 40.

18. Antieau, Sec. 19.11 at 19-27.

19. 45 O Jur 2d, Public Facilities, Sec. 61 at 213.

20. 64 Am. Jur. 2d, Public Utilities, Sec. 16; 'Feasible' does not mean, however, that a public utility may choose to serve an area only when such service is profitable. It has a broader meaning which allows the public utility to refuse service when the applicant is so isolated that providing it service would be economically prohibitive or present large technological barriers.

21. 64 Am. Jur. 2d, Public Utilities, Sec. 16.

22. *Id.*, Sec. 38.

23. ORC, Sec. 4905.32.

24. *Railroad Com. v. Hocking Valley R. Co.*, 82 OS 25, 91 N.E. 865.

25. *Quinn Coal Co. v. Hocking Valley R. Co.*, 20 OCC NS 420, 32 OCC 700.

26. 64 Am. Jur. 2d, Sec. 34.

27. *Id.*

28. *Id.*; Antieau, Sec. 19.11 at 19-30.

29. Antieau, Sec. 19.12 at 19-31.

30. *Id.*

31. *Rogers v. First Sewerage Dist.*, 171 So. 2d 820 (La. App. 1965).

32. *See*, 64 Am. Jur. 2d, Public Utilities, Sec. 18; Antieau, Sec. 19.11 at 19-28, Sec. 19.12 at 19-23.

33. *Edris v. Sebring Utility Comm.*, 237 So. 2d 585 at 587 (Fla. App. 1970).

34. 64 Am. Jur. 2d, Public Utilities, Sec. 18.

35. 67 O. App. 210, 36 N.E. 2d 306 (1940).

36. *See*, *City of Lawrence v. Robb*, 265 P. 2d 317 (Kan. 1954); *Rash v. Louisville and Jefferson County Met. S. Dist.*, 217 S.W. 2d 233 (Ky. 1949); *City of Covington v. Sanitation Dist. No. 1*, (Ky. 1957); *Michelson v. City of Grand Island*, 48 N.W. 2d 769 (Nebr).

37. *Indiana Study* at 58.

38. *Id.* at 58.

39. Id. at 59.

40. See, Indiana Study at 49.

41. See, Antieau, Sec. 19.06 at 19-19.

42. Id. at 19-16; State ex rel. Mt. Sinai Hosp. v. Hickey, 137 OS 474, 30 N.E. 2d 802 (1941).

43. ORC Sec. 4905.22; 45 O JUR 2d, Public Utilities, Sec. 87.

44. See, Antieau, Sec. 19.06 at 19-16.

45. See, Indiana Study at 49.

46. Id.

47. See, the proposed "User Charge System for the Montgomery County South Service Area Sewerage System," Montgomery County Sanitary Department, June,1975 (hereinafter, "Proposed User Charge System") at 10.

48. See, Indiana Study at 50, citing the Senate Report to Sec. 204 of the FWPCAA.

49. See, Indiana Study at 51.

50. See, State ex rel. Mt. Sinai Hosp. v. Hickey, supra.

51. See, n.42, supra; Antieau, Sec. 19.07 at 19-20.

52. See, Kliks v. Dallas City, 216 Ore. 160, 335 P. 2d 366 (1959).

53. See, F. & R. Lazarus Co. v. P.U.C.O.162 OS 223, 55 O Ops 113, 122 N.E. 2d 783.

54. See, Buckeye Lake Chamber of Commerce v. P.U.C.O., 161 OS 306, 53 O Ops 180, 119 N.E. 2d 51; the court held that rates for subscribers for telephone service in outlying areas which were higher than the base rates were lawful if reasonably related to differences affecting the expense or difficulty of performing the service required in such areas.

55. 45 O Jur 2d, Public Utilities, Sec. 139; ORC Sec. 4905.33.

56. Caldwell v. Abilene, 260 S.W. 2d 712, 714 (Tex. Civ. App. 1953).

57. *Hocking Valley R. Co. v. P.U.C.O.*, 92 OS 362, 110 N.E. 952.

58. *See*, 45 O JUR 2d, Public Utilities, Sec. 131.

59. *Cincinnati v. P.U.C.O.*, 113 OS 259, 148 N.E. 817.

60. *See*, n. 43, *supra*.

61. *See*, *Indiana Study* at 51.

62. 18 CFR Sec. 601.34, June 1970.

63. *See*, *Indiana Study* at 51.

64. *Id.* at 52.

65. *Id.* at 52-53.

66. *See*, "Proposed User Charge System" at 3.

67. *Id.* at 10.

68. *See*, Antieau, Sec. 19.09 at 19-24.

69. *See*, 64 Am.Jur. 2d, Public Utilities, Secs. 49-50.

70. 34 O Jur 2d, Licenses and Permits, Sec. 15.

71. Antieau, Sec. 14.00 at 14-5.

72. *See*, 49 O Jur 2d, Public Utilities, Sec. 2.

73. *Id.*

74. *See,* Antieau, Sec. 14.00 at 14-5.

75. *Lima v. Lima Cemetary Assoc.*, 42 OS 128.

76. *See*, Antieau, Sec. 14.01 at 14-6.

77. *See, G. Andrews Espy Realty Co. v. Burton-Rodgers, Inc.*, 116 N.E. 2d 14 (Ohio App. 1952).

78. ORC Sec. 727.01.

79. *See*, Columbus v. Sohl, 44 OS 479, 8 NE 299.

80. *See*, 49 O Jur 2d, Public Utilities, Sec. 6.

81. *Miami Conservancy District v. Ryan*, 104 OS 79, 135 N.E. 282; *See also*, Antieau, Sec. 14.24 at 14-45.

82. *See*, *Hostetter v. Muskingum Watershed Conservancy District*, 58 O. App. 161, 16 N.E. 2d 428; *Lasky v. Hilty*, 91 O. App. 136, 107 N.E. 2d 899; The fundamental principle underlying the imposition of special assessments on property for a public improvement is that the property is specially benefited and should bear its proportionate costs thereof corresponding to such benefit. *Limpert v. Day*, 7 O. Misc. 231, 218 N.E. 2d 209; *Arvidson v. Board of County Commissioners*, 27 O. Misc. 93, 269 N.E. 2d 432.

"Benefit" with respect to the validity of the special assessments means an actual increase in money value and a potential or actual added use and enjoyment of the property. *Arvidson*, *supra*.; *Limpert*, *supra*.
The enhancement in value of property that results from a public improvement is the special benefit that will support an assessment against that property to pay for the improvement. Such enhancement in value of such property is a benefit to its owner that accrues to him and not to the public or the rest of the community. *Schiff v. Columbus*, 9 OS 2d 31; 223 N.E. 2d 54.

83. *See*, Antieau, Sec. 14.01 at 14-7; *Barnhart v. City of Grand Rapids*, 237 Mich 90, 211 N.W. 96 (1926).

84. *See*, Antieau, Sec. 14.24 at 14-46; *Brock v. Lemke*, 51 Haw. 175, 44 P.2d 1 (1969).

85. *See*, *State ex rel. Shafer v. Otter*, 106 OS 415, 140 N.E. 399.

86. *See*, *Lasky v. Hilty*, *supra*.; *Baker v. Norwood*, 172 U.S. 269.

87. *Jackson v. Board of Education*, 115 OS 368; 154 N.E. 247.

88. *State ex rel. Monge v. Fairfield County*, 119 OS 93, 162 N.E. 393; ORC Sec. 6103.13.

89. *See*, Antieau, Sec. 19.16 at 19-40.

90. *Besack v. City of Beatrice*, 154 Neb. 142, 47 N.W. 2d 356 (1951).

91. *See*, Antieau, Sec. 14.02 at 14-8.

92. *See*, n. 80, *supra*.

93. 1955 OAG 6059.

94. ORC Sec. 727.08(F).

95. O Const. Art. XIII, Section 6.

96. *See*, *Upington* *v*. *Oviatt*, 24 OS 232.

97. *See*, *Findlay* *v*. *Frey*, 51 OS 390, 38 N.E. 114.

98. ORC Sec. 727.01(B).

99. *See*, *Mansield* *v*. *Brooks*, 110 OS 566, 144 N.E. 725.

100. *See*, 49 O JUR 2d., Public Utilities, Sec. 48 at 303.

101. ORC, Sec. 6115.48.

102. ORC, Sec. 6117.30.

103. ORC, Sec. 6155.09.

104. *See*, *Chamberlain* *v*. *Cleveland*, 34 OS 554.

105. *Graham* *v*. *Day*, 12 O. App. 2d 9, 230 N.E. 2d 453 (1967).

106. *See*, *Schiff* *v*. *Columbus*, 9 OS 2d 31, 223 N.E. 2d 54 (1967).

107. *See*, Antieau, Sec. 14.35 at 14-65.

108. *See*, *Roberts* *v*. *Richland Irrigation District*, 289 U.S. 71, 53 S.Ct. 519 (1933); *Wing* *v*. *Eugene*, 249 Ore. 367, 437 P. 2d 836 (1968); Antieau, Sec. 14.37 at 14-68.

109. *See, e.g.*, *Auditor General* *v*. *MacKinon Boiler and Machine Co*., 199 Mich. 489, 165 N.W. 771 (1917).

110. *State* *v*. *Pethel*, 158 OS 35, 106 N.E. 2d 626 (1952).

111. *See, e.g.*, *Garcia* *v*. *Falkenholm*, 198 A. 2d 660 (R.I. 1964).

112. *See*, Antieau, Sec. 14.29 at 14-54.

113. *See*, *Indiana Study* at 53.

114. *See*, *Columbus* *v*. *Sohl*, 44 OS 479, 8 N.E. 299.

115. *See*, *Indiana Study* at 52.

116. *Id*. at 53.

APPENDIX C

Geographical Jurisdiction and Intergovernmental Relations

The geographical jurisdiction of a political subdivision in Ohio is controlled largely by statute or charter. In many instances, however, this jurisdiction may be expanded by contractual agreement between two or more municipal corporations, counties, regional agencies, states or any combination thereof. At present, of all potential waste treatment management agencies in the Miami Valley region (MVR), only the geographical jurisdiction of the Miami Valley Regional Planning Commission (MVRPC) corresponds exactly to the boundaries of the MVR.

The MVRPC, however, does not possess most of the operational powers required by Section 208(c)(2) of the FWPCAA. Consequently, in order to fill jurisdictional gaps, potential management agencies in the MVR with operational powers must be capable of: (1) the performance of management functions beyond their boundaries; (2) statutory expansion of geographical jurisdiction and/or annexation, and/or (3) intergovernmental agreements. To insure integrated management of their activities on an areawide basis, as contemplated by the FWPCAA and the Guidelines, such intergovernmental agreements or institutional arrangements may be coordinated through MVRPC.

Most of the political subdivisions under study have the express authority for extraterritorial operation of waste treatment facilities. With proper authorization, there are rarely legal barriers to the exercise of proprietary powers (as opposed to police powers) beyond the boundaries of a political subdivision. Police powers such as zoning, on the other hand, generally cannot be exercised outside the boundaries of a political subdivision. Furthermore, most of the Ohio agencies are given the express authority to cooperate with other political subdivisions and to contract with one another for products and services. Finally, the ORC provides authority for the enlargement of several special districts, and annexation of territory by municipal corporations is provided for in the Ohio Constitution.

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The following material provides a summary of the geographical jurisdiction, opportunities for expansion of jurisdiction, and intergovernmental relations for the political subdivisions in Ohio which are considered as potential waste treatment management agencies. The geographical jurisdiction and intergovernmental agreements for the Ohio agencies are provided for in their enabling legislation and various other enactments of the State legislature.

1. Ohio Environmental Protection Agency (OEPA)

The OEPA, in its regulatory and administrative capacity, has geographical jurisdiction over the entire State of Ohio. However, the agency appears to lack the authority to exercise its powers and duties beyond the boundaries of the State. The Ohio General Assembly requires OEPA to adopt a long-term comprehensive plan and program to conserve, protect, and enhance the air, water, and other natural resources of the State (ORC, Section 3745.011(A); 6111.03(A)), to prevent and abate pollution of the environment for the protection and preservation of the health, safety, welfare and property of the people of the State (ORC, Section 3745.011(B)), and administer the air, water and other natural resources of the State for the use and benefit of the people of the State (ORC, Section 3745.011(C)). OEPA's general supervisory powers over water works systems are limited to those within the State (ORC, Section 6111.13). Its powers to adopt water quality and effluent standards (ORC, Section 6111.04) and its powers to issue, revoke and deny permits as a precondition to the discharge of wastes (ORC, Section 6111.03(J); 6111.04) are limited to control over the State's waters. Other regulatory and enforcement powers of OEPA also appear to be limited in geographical jurisdiction to Ohio.

The OEPA, however, does possess extraterritorial powers in a coordinating capacity. Section 6111.03(B) of the ORC authorizes the director of OEPA to

> (a)dvise, consult and cooperate with other agencies of the State, the federal government, and other states and interstate agencies, and with affected groups, political subdivisions, and industries in furtherance of (its purposes and powers).

Section 3745.01(C) of the ORC empowers OEPA to

> (e)nter into agreement for the utilization of the facilities and services of other departments, agencies, and institutions, public or private.

Consequently, while OEPA appears to have extraterritorial advisory powers, its important functions of regulation and enforcement do not cross Ohio's geographical boundaries.

2. Ohio Water Development Authority (OWDA)

OWDA is a statewide agency of the State of Ohio. As noted in the agency analyses, supra., it has broad management and financing powers. Nowhere within its enabling legislation is OWDA expressly authorized to exercise any powers outside of Ohio. However, unlike OEPA, OWDA's powers are not expressly limited to the State.

In Chapter 6121 (the enabling legislation for OWDA) a "water development project" is defined as a water management or wastewater facility acquired or constructed by OWDA or by a governmental agency (ORC, Section 6121.01(F)). In the same section, "governmental agency" is defined to include departments, divisions or other units of State government, the United States or any agency thereof, and any agency, commission, or authority established pursuant to an interstate compact or agreement (ORC - Section 6121.01(B)). Thus, "governmental agency" refers to political subdivisions not only within but outside of Ohio.

Using the above definitions, it would appear that OWDA has the authority to construct, operate, lease or contract for the operation of another waste treatment facility outside of Ohio. (ORC, Section 6121.03(F)). In addition, OWDA has the authority to

> make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6121 (ORC, Section 6121.03(L)).

Most importantly, Section 6121.03(G) empowers OWDA to

> (m)ake available the use or services of any water development project to one or more persons, one or more governmental agencies (emphasis added), or any combination thereof.

It should be noted, however, that OWDA's authority to construct and operate waste treatment works outside of Ohio is implied and not expressed.

One of OWDA's important enforcement provisions is its powers to take over a waste disposal system which is in default of a permit issued by the director of OEPA, operate the system, and form a wastewater facility service area for the management of waste disposal and treatment in the defaulting area. OWDA may include any contiguous territory not served by wastewater facilities that it determines to be desirable to include in the area. Any other governmental agency or person may agree with OWDA to join the area (ORC, Section 6121.041). Consequently, there would appear to be authority for OWDA to include an area outside of Ohio in a wastewater facility's service area; but it is uncertain whether such area could be compelled to join even though it is contiguous to a service area in default of an OEPA permit and not being served by waste treatment facilities of its own.

3. Sanitary Districts (SD)

The SDs are regional agencies created by a judge of the Court of Common Pleas of one or more counties (ORC, Section 6115.04). The districts must include two or more political subdivisions (ORC, Section 6115.05). The geographical jurisdiction of SDs is not made clear by the enabling legislation, but it appears that SDs do possess limited operational and management powers outside their boundaries.

In addition, it is important to note that SDs have the express power to enter into contracts and agreements with the federal government and other states, including political subdivisions of the latter (ORC, Section 6115.27).

Section 6115.18 of the ORC endows SDs with extraterritorial operational powers. Subsection 6115.18(c) states that the board of directors of an SD is empowered to

> (c)onstruct, preserve, operate and maintain in or out of said district (emphasis added), . . . treatment and disposal works . . . and any other works and improvements deemed necessary to accomplish the purposes of the district.

Furthermore, the board is empowered to

> (c)onstruct any of said works and improvements across or through any public or private property in or out of said district (emphasis added). (ORC, Section 6115.18(G)).

On the other hand, Section 6115.04(D) of the ORC states that an SD may be established

> (t)o provide for the collection and disposal of sewage and other liquid waste produced within the district (emphasis added).

These two sections seem slightly contradictory concerning the geographical jurisdiction of SDs. However, the express authorization to construct and operate waste treatment works outside the district should not be considered severely limited by the statement of purpose mentioned in Section 6115.04(D), *supra*.

A limitation upon the geographical jurisdiction of SDs is that their powers do not extend to the construction and operation of waste treatment and collection systems for local service within the political subdivisions forming the district (ORC, Section 6115.18).

In preparing an official plan for district improvements, the board of an SD may plan for areas beyond the current boundaries of the SD in consideration of future extensions and enlargements of the district (ORC, Section 6115.16).

Section 6115.31 of the ORC provides for extension or reduction of the area of the SD based upon the benefits from SD improvements received by the land. It states:

> If the board of appraisers of a (SD) finds that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in the district, it shall appraise the benefits and damages to such land, and shall file notice in the court of the appraisal which it has made upon lands beyond the boundaries of the district, and to the land which in its opinion should be included in the district. The board shall also report to the court any lands which in its opinion should be eliminated from the district.

Section 6115.68 of the ORC provides for union of two or more SDs. It states in part that:

> If two or more (SDs) have been organized in a territory which, in the opinion of the board of directors of the (SD) of either of the districts, should constitute only one district, the board of any of the districts may petition the (court of common pleas) for an order uniting said districts into a single district . . . (OR), instead of organizing a new district from such constituent districts, the court may direct that one or more of such districts described in the petition be included into another of said districts which other district shall continue under its original corporate name and organization, or it may direct that the districts so absorbed shall be represented on the board of the original district . . . or it may direct that the included districts shall become subdistricts of the main district.

Section 6115.69 of the ORC provides for the organization of subdistricts within SDs.

> Whenever it is desired to construct improvements wholly within or partly within and partly without any (SD), which improvements will affect only part of said district, for the purpose of accomplishing such work, subdistricts may be organized upon petition of the owners of real property within or partly within and partly without the district.

The Court of Common Pleas has plenary, complete and final jurisdiction over both organization of SDs and changes in its boundaries. See, Niles v. Evans, 73 OLA 493 (CD).

4. Regional Water and Sewer Districts (W&S)

The geographic jurisdiction of W&S Districts is regional, (i.e., including two or more political subdivisions of the State of Ohio -- counties, townships, municipal corporations or any combination thereof) (ORC, Section 6119.02). W&S Districts are created by petitioning the Court of Common Pleas in one of the counties in which the district is situated (ORC, Sections 6119.02 - 6119.04).

The W&S Districts are expressly authorized to

> (a)cquire, construct, . . .maintain, . . . operate, lease or rent to or from, or contract for operation by or for, a political subdivision or person, water resource projects *within or without the district* (emphasis added)(ORC Section 6119.96(G)),

and to

> (m)ake available the use or service of any water resource project to one or more persons, one or more political subdivisions, or any combination thereof (ORC, Section 6119.06(H)).

They are also empowered to

> (e)nter into contracts with any person or political subdivision to render services to such contracting party for any service the district is authorized to provide (ORC, Section 6119.06(P)).

"Political subdivision" includes units of government of other states and the United States (ORC, Section 6119.01(D)). These sections taken together empower W&S Districts to construct, operate and manage waste treatment and collection facilities both within and outside of Ohio.

Section 6119.06(X) of the ORC provides a procedure for the merger of two or more W&S Districts into a single district. To enlarge the territory covered by the district, any county, township, or municipal corporation whose territory is not wholly included within such district may file an application with such district for inclusion. If the board of trustees of the district or the Court of Common Pleas approves the application, the territory will be included in the district (ORC, Section 6119.05).

Another way in which the district may be enlarged is through a petition originated by the board of trustees to the Court of Common Pleas, which before approving the petition shall hold public hearings to determine whether or not the subject of the petition is conducive to the public health, safety, convenience or welfare. Section 6119.051 authorizes the board to petition for change. One of the situations in which such a petition is authorized occurs when the board wishes to amend any provisions of the original petition which established the district, a provision of which is "a general description of the territory to be included in the district . . ." Thus, the board of trustees has the implied authority to enlarge the district.

5. Conservancy Districts (CD)

The CDs are regional agencies which are created by filing a petition with the Court of Common Pleas in one of the counties where the district is situated. When organized, a CD is a political subdivision of the State and a body corporate with all its inherent powers (See, ORC, Sections 6101.04-6101.09).

The CDs have the express authority to construct, operate or maintain sewers, treatment and disposal works, and any other works and improvements deemed necessary to accomplish the purposes of the district in or out of the district (emphasis added) (ORC, Section 6101.15(C)). The board of directors of a CD may

> (c)onstruct any of said works and improvements across, through, or over any public highway, canal . . . or other public or private property located in or out of said district (emphasis added) (ORC, Section 6101.15(I)).

Most importantly, express authority exists for CDs to enter into contracts and agreements with the United States, state governments, and political units of states to service these areas through their works and improvements (ORC, Section 6101.23). The section states:

> The board of directors of a(CD) may enter into contracts or other arrangements with the (U.S.) government or any other department thereof, with persons, . . . and with the state government of this or other states, with drainage, conservation, conservancy, sewer, park or other improvement districts, in this or other states, for cooperation or assistance, not in violation of (Article VIII, O. Constitution), in constructing, maintaining, using, and operating the works of the district, the waters thereof, . . . or in minimizing and preventing damage to the properties, works and improvements of the district from soil erosion . . . The board may purchase, lease or acquire land or other property in adjoining states to secure outlets or for other purposes of Sections 6101.01 to 6101.84, inclusive, of the (ORC), and may let contracts or spend money for securing such outlets or other works in adjoining states.

There are no statutory provisions which deal expressly with enlargement of CDs. Section 6101.29 of the ORC, however, states that when it is determined by the board of appraisers of a CD that land outside the district is benefitted by its (the district's) improvements, the board shall file with the Court of Common Pleas a notice of the appraisal and a description of the territory it feels should be included in the CD. (The same procedure is available for eliminating land from a CD.) The sections which follow, 6101.30 to 6101.43, inclusive, of the ORC, state in detail requirements for notice, hearings, decrees, appeals, and awards. The final determination of whether lands benefitted should be included in the CD is made by the Court of Common Pleas which has jurisdiction of the CD (ORC, Section 6101.34).

Pursuant to Section 6101.72 of the ORC, an existing CD may absorb any territory in which a proceeding has been instituted or is pending for construction of enumerated improvements which includes county sewers or any sewer district outside of a municipal corporation. The petition for inclusion is filed in the Court of Common Pleas which created the CD and the procedure is detailed in the above section.

The same lands may be included in more than one CD if conducive to the public health, safety, convenience or welfare (ORC, Section 6101.68). This determination is made by the Court of Common Pleas. If there exists a conflict of jurisdiction, the procedures enumerated in ORC, Section 6101.69 -- concerning consolidation of CDs and adjustment of boundaries -- will govern. Section 6101.70 of the ORC sets forth the procedure by which two or more CDs may be joined by the filing of a petition in the Court of Common Pleas by the board of directors of one of the districts. If improvements affect only part of a CD, subdistricts may be created (ORC, Section 6101.71). For a more detailed discussion of subdistricts, see the report, A Review of Regional Agencies Impacting Regional Water Quality Management

6. Soil and Water Conservation Districts (SWCD)

The SWCDs are regional districts created by landowners filing a petition with the Ohio Soil and Water Conservation Commission. Territory may be in only one SWCD. Petitions for expansion of the district are filed with the supervisors of an existing SWCD (ORC, Section 1515.03). A voter referendum is a prerequisite to the formation of a SWCD (ORC, Section 1515.04).

> The Ohio Soil and Water Conservation Commission is empowered
>
> (t)o seek the cooperation and assistance of the federal government or any of its agencies, and of agencies of (Ohio) in the work of (SWCDs) (ORC, Section 1515.02(C)).

The supervisors of two or more adjoining SWCDs may form a joint board for the purpose of construction, operation and maintenance of improvements in the districts (ORC, Section 1515.17). County commissioners may enter into service agreements with SWCDs in furtherance of conservation projects (1956 OAG 6136). However, the power of SWCDs to make improvements and operate projects seems to be limited to the area included within the district. SWCDs lack the extraterritorial powers which are granted to the other regional agencies which have potential wastewater management functions.

7. Regional Planning Commissions and Councils of Governments (COG)

The COGs are created by an agreement between political subdivisions to establish the same.

> That governing bodies of two or more counties, municipal corporations, townships, special districts, school districts, or other political subdivisions may enter into an agreement with each other, or with the governing bodies of counties, municipal corporations, townships, special districts, school districts or other political subdivisions of any other state (emphasis added) to the extent that laws of such other state permit, for the establishment of a regional council consisting of such political subdivisions (ORC, Section 167.01).

Thus, COGs, under Ohio law, are expressly authorized to include territory located outside of Ohio to the extent consistent with the other state's laws.

A regional planning commission in Ohio, organized under Section 713.21 of the ORC, may be formed by an agreement to cooperate by the legislative authorities of any municipal corporations, townships or counties in Ohio. Thus, a regional planning commission may not include any political subdivisions located outside of Ohio. Any regional or county planning commissions may form, by agreement among them, a joint planning council (ORC, Section 713.23). Additionally, a regional or county planning commission has the power to contract

> with and (provide) planning assistance to other units of local government, councils of governments, planning commissions, and joint planning councils; (to coordinate) the planning with neighboring planning areas; (to cooperate) with the state and federal governments in coordinating planning activities and programs and programs in the region (ORC, Section 713.23(B)(4)).

An Interstate Regional Planning Commission may be created pursuant to Section 713.30 of the ORC. Such commission is formed by a cooperative agreement among legislative authorities of counties and municipal corporations in Ohio and an adjoining state whenever the region would benefit from cooperative governmental planning. An interstate planning commission may also be created by compact. The powers and duties of this commission (ORC, Section 713.33) are nearly identical to those of regional and county planning commissions.

8. Sewer Districts: County Sewers

County governments operate at an intermediate level of geographical jurisdiction between local governments and the state. Their exercise of police powers is restricted to the county boundaries. Their proprietary powers, however, may extend beyond the actual borders of the county.

The formation of county sewer districts is authorized by Chapter 6117 of the ORC. Counties may operate sewers and sewage treatment or disposal works both within and without the county sewer districts (ORC, Section 6117.01). This section, however, limits the jurisdiction of county sewer districts to land outside of municipal corporations, unless such authority is granted by resolution or ordinance by the legislative body of a municipal corporation (ORC, Section 6117.03-6117.05). In addition, when it is necessary to service landowners outside of municipal corporations, a county sewer district may, subject to limitations, construct sewers in the streets and alleys of such municipalities (ORC, Section 6117.40). The plan of sewerage and sewage disposal prepared by the county sanitary engineer is limited to the area included in the county sewer district (ORC, Section 6117.06).

The board of county commissioners is authorized to contract with individuals, corporations, and public institutions outside of the district for sewer service and treatment and disposal of wastes (ORC, Section 6117.38). The board is also authorized to enter into an agreement with any municipal corporation, township, soil and water conservation district, conservancy district, any other taxing district or any other county where the board is empowered to exercise any power possessed by the contracting subdivision (ORC, Section 307.15). The board of county commissioners may enter into an agreement with the legislative authority of any municipal corporation for the joint control of water pollution and the joint use and operation of any sewers and sewage treatment and disposal facilities (ORC, Sections 307.151; 6117.41). The board, pursuant to Section 307.151, is also authorized to enter into an agreement with a county, municipal corporation, or regional planning commission for the joint preparation of land use studies.

County sewer districts may appropriate through condemnation and eminent domain existing sewers constructed by a corporation, individual or public institution when such acquisition is expedient for extending service (ORC, Section 6117.38); and may appropriate land through condemnation and eminent domain, which is located within or outside of the county sewer district (ORC, Section 6117.39).

Counties may organize county planning commissions whose powers and intergovernmental relations are much like those of regional planning commissions, supra.

9. Municipal Corporations (MCs)

Municipalities are the local level of government in Ohio. Section 715.40 of the ORC empowers MCs to construct and operate sewers and sewage treatment and disposal works. Additionally, Article XVIII, Section 8 of the Ohio Constitution authorizes MCs to

> acquire, construct, own, lease and operate within or without its corporate limits (emphasis added), any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants.

MCs are expressly authorized to contract with counties for the joint control of water pollution and operation of waste treatment and disposal facilities (ORC, Section 307.151, supra.) Joint municipal improvements are authorized by Section 715.02 of the ORC. Additionally, Article XVIII, Section 4 of the Ohio Constitution authorizes a MC to contract with others for any product or service furnished by a public utility.

A MC cannot exercise its police powers, such as zoning, beyond its corporate limits, State v. Contini, 86 O Abs 210, 176 N.E. 2d 536. However, Section 307.151, supra., authorizes the joint preparation of land use studies by counties, MCs and regional planning commissions. Furthermore, a MC may establish a planning commission pursuant to Section 713.01 of the ORC. Such commission may make plans for land within the MC, and for land outside the corporate boundaries which the commission determines in relation to the planning of the MC (ORC, Section 713.02). The land included in plans and recommendations may also be in an adjoining county (1954 OAG 3805).

Finally, MCs may alter their geographical jurisdiction through annexation of territory. The laws and procedures of annexation are governed by Chapter 709 (Sections 709.01 to 709.42, inclusive). Sections 709.02 to 709.12 inclusive,deal with annexation on the application of a citizen; Sections 709.13 to 709.21 deal with annexation on the application of a corporation; and Sections 709.22 to 709.37 deal with annexation of one MC to another. The content of these sections need not be examined for the purposes of this report.

APPENDIX D

Public Participation Requirements

The regulations in 40 (Code of Federal Regulations) CFR 105 require State (emphasis added) agencies to do the following.

1. Develop a program that will provide informational materials for public use at the earliest possible time.

2. Make sure that such information -- which is to include water quality data and other pertinent information -- is conveniently accessible to the public at informational "depositories" in appropriate locations.

3. Provide technical and information assistance "to public groups for citizen education, community workshops, training, and dissemination of information to communities."

4. Develop mechanisms that will allow interested or affected individuals and organizations to have early consultation with the agencies on program matters.

5. Develop and maintain lists of individuals who wish to receive information from the agency on a regular basis.

6. Follow EPA regulations concerning procedures for the holding of public hearings if the State agency's procedures are less stringent.

7. Conduct public hearings whenever there is significant public interest.

8. Whenever there is doubt concerning the degree of public interest, the question should be resolved in favor of holding the hearing or, if necessary, of providing alternative opportunity for public participation.

9. Give the public at least 30 days notice prior to hearings and prepare detailed fact sheets on the issues involved.

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10. Provide an opportunity for public comment before any settlement with a pollution source is negotiated.

11. Encourage the public to report violations of water quality laws.

12. Develop procedures for the consideration of evidence submitted by the public.

13. Include a summary of public participation in any application for a construction project grant. Each summary must include a description of the measures taken by the agency to provide for, encourage and assist public participation in relation to the matter; the public response to such measures; and the disposition of significant points raised.

APPENDIX E

SUMMARY CHART OF REQUIRED AND ANCILLARY AUTHORITIES FOR REVIEWED GOVERNMENTAL ENTITIES

		OEPA	OWDA	DNR	CONSERV. DIST.	SANIT. DIST.	WATER & SEWER	SOIL & WATER	COG	REGION'L PLNG	COUNTY SEWER	MUNIC CORP'S
A1	AUTHORITY TO CONSTRUCT AND OPERATE A WASTE TREATMENT WORKS		●	◌	●	●	●	◌			●	●
2	AUTHORITY TO ACCEPT OR RECEIVE MONIES FROM ANY SOURCE INCLUDING, BUT NOT LIMITED TO, FEDERAL GRANTS	●	●	●	○	●	●	●	●	●	○	○
3	AUTHORITY TO ASSESS "USER CHARGES" BASED ON THE COSTS OF TREATMENT OR THE CHARACTERISTICS OF THE EFFLUENT		○	○	○	○	○	○			○	○
4	AUTHORITY TO COMPLY WITH THE "INDUSTRIAL COST RECOVERY" REQUIREMENTS OF THE ACT		◌	◌	◌	◌	◌	◌			◌	◌
5	AUTHORITY TO INCUR SHORT- AND LONG-TERM INDEBTEDNESS		●		●	●	●				●	●
6	AUTHORITY TO CHARGE EACH PARTICIPATING COMMUNITY ITS PROPORTIONATE SHARE OF THE TREATMENT COSTS		○	○	○	○	○	○			○	○
7	AUTHORITY TO REFUSE TO RECEIVE ANY WASTES FROM ANY MUNICIPALITY WHICH DOES NOT COMPLY WITH THE AREAWIDE PLAN		◌	◌	◌	◌	◌				◌	◌
8	AUTHORITY TO ACCEPT INDUSTRIAL WASTES FOR TREATMENT, AND TO REFUSE TO ACCEPT INDUSTRIAL WASTES WHEN THE INDUSTRY FAILS TO COMPLY WITH THE AREAWIDE PLAN		◌	◌	◌	◌	◌	◌			◌	◌
9	AUTHORITY TO IMPOSE LAND USE CONTROLS										●	●
10	AUTHORITY TO ACQUIRE LAND THROUGH CONDEMNATION AND EMINENT DOMAIN		●	●	●	●	●				●	●
B11(a)	AUTHORITY TO REFUSE ADDITIONAL "HOOK-UPS" FROM ANY OR ALL USERS IN A MUNICIPALITY WHICH DOES NOT COMPLY WITH THE AREAWIDE PLAN	●		◌	◌	◌	◌				○	◌
11(b)	AUTHORITY TO IMPOSE CIVIL OR CRIMINAL SANCTIONS	●	◌		●	●					○	●
12	AUTHORITY TO REQUIRE COMMUNITIES AND/OR INDUSTRIES TO PARTICIPATE IN THE WASTE TREATMENT SYSTEM	◌	◌			○	●					
13	AUTHORITY TO ENTER, INSPECT, AND MONITOR THE PREMISES AND THE DISCHARGES OF USERS OF THE SYSTEM	●	○	○	○	●	○				○	○
14	AUTHORITY TO CONTRACT WORK TO OTHER AGENCIES, PRIVATE CORPORATIONS, OR PERSONS	●	●	○	●	●	●	●	●	●	○	●
15	AUTHORITY TO EMPLOY MANAGERS, ENGINEERS, ETC.	○	●	○	●	●	○	●	●	●	●	●
16	AUTHORITY TO INSURE FACILITIES AND EMPLOYEES	○	●	○	●	○	●	○	○	○	○	○
17	AUTHORITY TO ACQUIRE BY GIFT OR PURCHASE, HOLD IN FEE OR BY LEASEHOLD, AND DISPOSE OF REAL AND PERSONAL PROPERTY		●	●	●	●	●	●	●	●	●	●
18	AUTHORITY TO MAKE, DISTRIBUTE OR REDISTRIBUTE LOANS AND GRANTS TO OTHER AGENCIES	●	●	●			●		○	○		
19	AUTHORITY TO ENTER INTO CONTRACTS WITH LOCAL, COUNTY, REGIONAL AND STATE AGENCIES AND THE FEDERAL GOVERNMENT	○	●	●	●	●	○	●	●	●	●	●
20	AUTHORITY TO REASSIGN THE LEASED RIGHT OF ANY INDUSTRIES TO DISCHARGE INTO THE SYSTEM		◌	◌	◌	◌	◌	◌			◌	◌
21	AUTHORITY TO INVEST ELSEWHERE MONIES RAISED IN EXCESS OF CURRENT EXPENDITURES		●				●					
22	AUTHORITY TO CONTRACT FOR PRIVATE FINANCING					●	◌					
23	AUTHORITY TO ENGAGE IN PLANNING RELATED TO THE WATER QUALITY OF THE REGION INCLUDING, BUT NOT LIMITED TO, LAND USE PLANNING	●		●	●	●	●	●	●	●	●	●
24	AUTHORITY TO ENGAGE IN PUBLIC HEALTH FUNCTIONS INCLUDING, BUT NOT LIMITED TO, REGIONAL WASTE MANAGEMENT AND SOLID WASTE DISPOSAL	●	●			●					●	●
25	REQUIREMENTS TO CONSIDER PUBLIC [illegible] BEFORE ADOPTING PLANS, RULES AND REGULATIONS	●	●		●	●						

● EXPRESS AUTHORITY

○ IMPLIED OR INHERENT AUTHORITY

◌ UNCERTAIN AUTHORITY

☐ NO AUTHORITY

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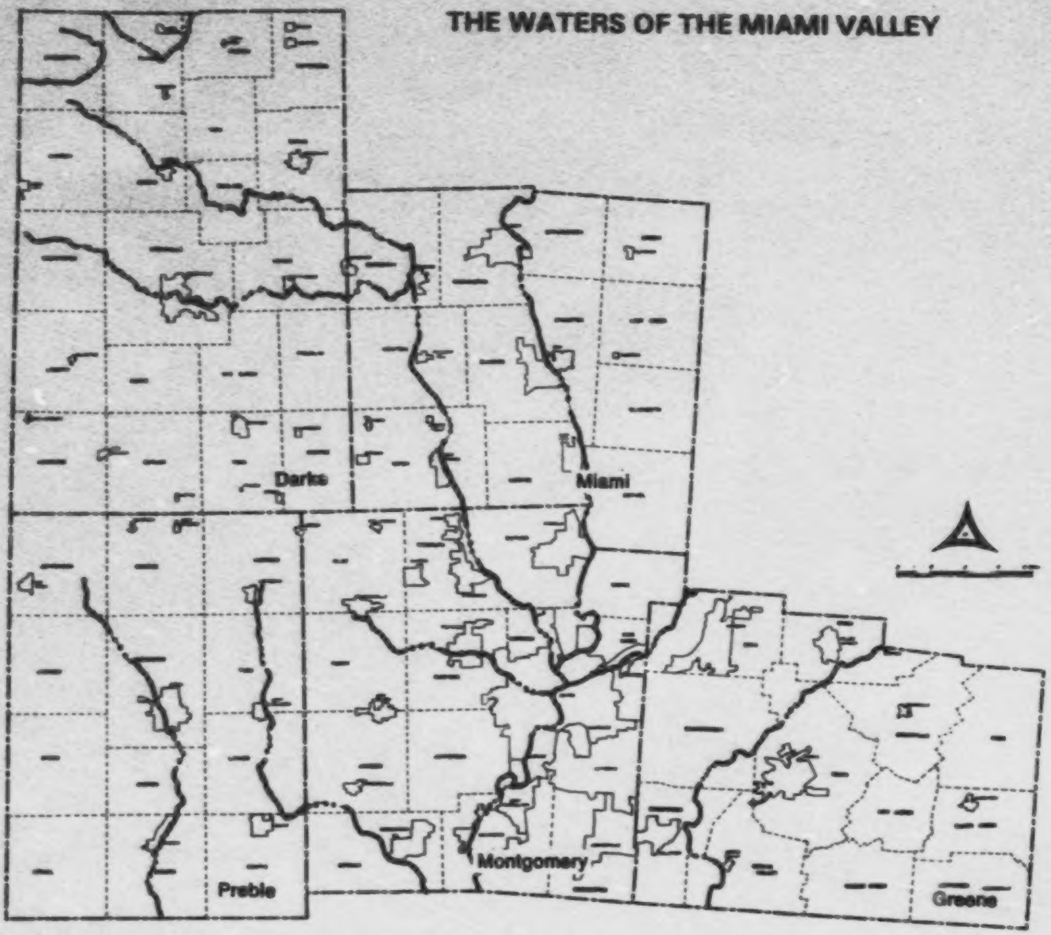
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